Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

* * *

NO. 85, ORIGINAL

STATE OF TEXAS,

Plaintiff

V.

STATE OF OKLAHOMA,

Defendant

* * *

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT AND BRIEF IN SUPPORT OF MOTION

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

* * *

NO. ____, ORIGINAL

STATE OF TEXAS,

Plaintiff

V.

STATE OF OKLAHOMA,

Defendant

* * *

MOTION FOR LEAVE TO FILE COMPLAINT

* * *

The State of Texas, by its Attorney General, respectfully asks leave of the Court to file its Complaint against the State of Oklahoma submitted herewith.

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The State of Texas

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

* * *

NO. ____, ORIGINAL

STATE OF TEXAS,

Plaintiff

V.

STATE OF OKLAHOMA,

Defendant

* * *

COMPLAINT

* * *

The State of Texas, by its Attorney General, brings this suit against the Defendant, the State of Oklahoma, and for its cause of action, states:

I.

The original and exclusive jurisdiction of this Court is invoked under Article III, Section 2, of the Constitution of the United States, and 28 U.S.C. §1251(a)(1) (1976).

II.

The State of Texas was admitted to the Union by joint resolutions of Congress dated March 1, 1845 and December 29, 1845. 5 Stat. 797, 9 Stat. 108, respectively. In *United States v. Texas*, 162 U.S. 1 (1895) this Court established the boundary between the United States and the State of Texas, from the 100th meridian of longitude to the eastern border of the then Territory of Oklahoma, as the south bank of the Red River. In *Oklahoma v. Texas*, 256 U.S. 70 (1921) this Court

affirmed its holding in *United States v. Texas, supra,* and held, *inter alia,* that the intervening admission to the Union of the State of Oklahoma by Act of June 16, 1906, 34 Stat. 267, Ch. 3335 had no effect on the boundary between the States of Oklahoma and Texas as the south cut bank of the Red River.

III.

On June 28, 1938, Congress enacted the Flood Control Act of 1938, 52 Stat. 1215, which authorized the construction of Denison Dam by the Army Corps of Engineers on the Red River for the purposes of flood control and hydroelectric power. The construction of the Dam began in 1939 at a point on the Red River approximately 13 miles north of the City of Sherman in Grayson County, Texas. Upon completion in 1944, the Dam was closed, causing the formation of Lake Texoma west of the Dam for a distance of approximately 25 miles to the 97th meridian of longitude. The south bank of the Red River for this segment of the Texas-Oklahoma boundary is no longer visible as a result of the formation of Lake Texoma. The south bank downstream from the Dam has also been obliterated due to construction at the Dam site of a powerhouse, switchyard, and other facilities necessary for the generation of hydroelectric power at the Dam. Thus, the construction of Denison Dam has obscured a significant portion of the Texas-Oklahoma boundary.

IV.

The State of Texas asserts that the construction of Denison Dam did not change in any manner the boundary between Texas and Oklahoma. The boundary remains the south cut bank of the Red River as it existed prior to the construction of the Dam. At all times since construction of the Dam the State of Texas has exercised complete sovereignty over the area south of the original south bank of the Red River, providing for the health

and welfare of its inhabitants, enforcing its laws thereon, and doing all such other acts of dominion as are ordinarily exercised by a sovereign.

V.

The Federal Energy Regulatory Commission (FERC) is a federal agency empowered under the Federal Power Act, 16 U.S.C. §824 (1976), to regulate the sale of electricity in interstate commerce. In a proceeding, Docket No. E-9578, pursuant to said authority the FERC purports to adjudicate the boundary between Texas and Oklahoma as the *new* south shore of Lake Texoma west of Denison Dam and the *new* south bank of the Red River downstream from the Dam. By its failure to intervene the State of Oklahoma has acquiesced in this proceeding, the result of which will interfere with the sovereignty of the State of Texas over the area in controversy. The State of Oklahoma is implicitly asserting rights of dominion and sovereignty over said area. These implicit claims of the Defendant, the State of Oklahoma, have caused and will continue to cause irreparable injury to the Plaintiff, the State of Texas, and to its sovereignty for which there is now no remedy at law.

WHEREFORE, the State of Texas prays that a decree be entered declaring the boundary between the State of Texas and the State of Oklahoma, from the Grayson County line at the western edge of Lake Texoma to the northeast corner of the Army Corps of Engineers' property south of the Red River, as the south cut bank of the Red River as it existed prior to the construction of Denison Dam; that the State of Texas be declared to be the sovereign entitled to exercise jurisdiction and dominion over said area; and adjudging that the Defendant, the State of Oklahoma, has no sovereign right or interest in or to any said land or any part thereof.

Respectfully submitted,

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The State of Texas

BRIEF IN SUPPORT OF MOTION

* * *

JURISDICTION

The State of Texas seeks to bring this suit against the State of Oklahoma under the authority of Article III, Section 2, of the Constitution of the United States, and 28 U.S.C. §1251(a)(1) (1976).

STATEMENT OF THE CASE

The purpose of this litigation is to establish and confirm the boundary between the States of Texas and Oklahoma, from the western edge of Lake Texoma to the northeast corner of the Army Corps of Engineers' property south of the Red River in Grayson County, Texas, as the south cut bank of the Red River as it existed prior to the construction of Denison Dam.

The history of the establishment of the Texas-Oklahoma boundary from the 100th meridian of longitude to the eastern border of Oklahoma can be briefly stated. The boundary has remained virtually unchanged since its original demarcation in the Treaty of 1819, 8 Stat. 252 (1821), as part of the boundary between the United States and the Spanish possessions. The definition of the boundary contained in the Treaty was construed by this Court in *United States v. Texas*, 162 U.S. 1 (1895) to be the south bank of the Red River. This construction of the Treaty was affirmed in *Oklahoma v. Texas*, 256 U.S. 70 (1921). In a later partial decree in *Oklahoma v. Texas*, 261 U.S. 340 (1923) this Court, at 341-42, defined the south bank as

> the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river which separates its bed from the adjacent upland, whether valley or hill, and usually

> serves to confine the waters within the bed and to preserve the course of the river.
>
> The boundary between the two states is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

In 1938 Congress authorized the construction by the Army Corps of Engineers of Denison Dam on the Red River, at a point approximately 13 miles north of the City of Sherman in Grayson County, Texas, for the purposes of flood control and hydroelectric power. *See* 52 Stat. 1215 (1938). The construction of the Dam caused the formation of Lake Texoma west of the Dam site, stretching approximately 25 miles to the 97th meridian of longitude. As a result, the original south bank of the Red River is no longer visible above water. Immediately downstream from the Dam the course of the Red River was changed to accomodate the hydroelectric power facilities. Thus, the south bank of the Red River downstream from the Dam for approximately one-half mile has also been obliterated. Consequently, the boundary between Texas and Oklahoma, from the Grayson County line at the western edge of Lake Texoma to a point approximately one-half mile downstream from the dam is no longer visibly discernable.

The Federal Energy Regulatory Commission is authorized under the Federal Power Act to regulate the sale of electricity in interstate commerce. 16 U.S.C. §824 (1976). In Docket No. E-9578, a proceeding pursuant to said authority, the FERC is seeking to adjudicate the boundary between Texas and Oklahoma at Denison Dam as the south shore of Lake Texoma and the *new* south bank of the Red River downstream from the Dam. The State of Texas has intervened in this proceeding to protest the FERC's imminent violation of Texas'

jurisdiction and dominion over the area in question. The State of Oklahoma has failed to intervene. The State of Texas considers this silence of the State of Oklahoma as an implicit attempt to lay claim to the area in dispute. The State of Texas must respond to this threat to its sovereignty by invoking the original and exclusive jurisdiction of this Court, there being no other competent forum available.

ARGUMENT

I. THE COMPLAINT REFLECTS A JUSTICIABLE CASE AND CONTROVERSY OVER WHICH THE COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION.

This Court has original and exclusive jurisdiction of a case or controversy between two or more states under Article III, Section 2, of the United States Constitution and 28 U.S.C. §1251(a)(1) (1976). Due to its increasing duties with the appellate docket, this Court has limited the invocation of its original jurisdiction, and made it "obligatory only in appropriate cases." *Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91, 93 (1972). The State of Texas respectfully submits that a boundary dispute between two states is the kind of appropriate case which this Court is obligated to adjudicate. This Court has recognized that boundary disputes between states can escalate into armed conflict without the prompt intervention and ultimate resolution by the Supreme Court. *Oklahoma v. Texas*, 258 U.S. 574 (1921). Under our federal constitutional system, the States have sacrificed the sovereign right to defend their boundaries from encroachment by neighboring states in exchange for the right to seek adjudication of a boundary dispute by the Supreme Court. The State of Texas is hereby seeking to invoke this constitutional right.

A genuine case and controversy now exists between the State of Texas and the State of Oklahoma. The failure of the State of Oklahoma to intervene in the FERC proceeding, which purports to change the Texas-Oklahoma boundary, is simply an attempt to accept guietly the territorial benefits resulting from the FERC proceeding. The State of Texas cannot permit this threat to its sovereign dominion over the area in question to go unchecked. Thus, the original and exclusive jurisdiction of this Court is being invoked.

II. THE COURT IS THE ONLY COMPETENT FORUM TO ADJUDICATE THIS CONTROVERSY.

The State of Texas has intervened in the FERC Docket No. E-9578 and moved for an indefinite stay of that proceeding pending the resolution by this court of the boundary dispute at Lake Texoma and Denison Dam. Texas submits that the FERC is incompetent to make a finding affecting the sovereign rights of the State of Texas once the State has become a party to the proceeding.

Indeed, Texas has an absolute right to a determination by the Supreme Court of its boundary with Oklahoma. In *Durfee v. Duke*, 375 U.S. 106 (1963), this Court recognized that lower court decisions involving private litigation over state boundaries could not bind the States with respect to any controversy they may have over the boundary. The Court stated that "either State may at any time protect its interest by initiating independent judicial proceedings here." 375 U.S. at 116. *See Mississippi v. Arkansas*, 415 U.S. 289 (1974). Texas is protecting its interest in the integrity of its boundary with Oklahoma by initiating this original action.

CONCLUSION

The Complaint which Texas asks leave to file presents a traditional conflict of sovereign interests and a consequent threat of irreparable damage to the State of Texas, which only the Supreme Court of the United States can remedy. Therefore, in conformity with the high purpose of the powers conferred on this Court by Article III, Section 2 of the Constitution, this Court should exercise its authority to hear and determine this dispute. The State of Texas respectfully submits that the Motion for Leave to File the Complaint should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS,
Plaintiff,

VERSUS

STATE OF OKLAHOMA,
Defendant.

RESPONSE OF THE STATE OF OKLAHOMA TO MOTION FOR LEAVE TO FILE COMPLAINT

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January, 1980

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In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS,
Plaintiff,

VERSUS

STATE OF OKLAHOMA,
Defendant.

RESPONSE OF THE STATE OF OKLAHOMA TO MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT OF THE CASE

This litigation was commenced by the State of Texas alleging that a dispute exists as to the boundary between the State of Texas and the State of Oklahoma in and adjacent to Lake Texoma. The State of Texas specifically asks that the boundary be established as the south cut bank of the Red River as it existed prior to the construction of the Denison Dam.

The State of Oklahoma and the State of Texas have been parties in numerous controversies concerning the location of the boundary at various points along the Rio Roxo de Nachitoches or Red River. Although there has been considerable litigation the general history of the estab-

lishment of the boundary is subject to brief summarization. From the 100th meridian of longitude, the western border of Oklahoma, to the eastern border of Oklahoma the states share a common boundary of some 539 miles.

The southern boundary of the State of Oklahoma was established by virtue of the Treaty of 1819, 8 Stat. 252 (1821), as a part of the boundary between the United States and the possessions of Spain on the North American Continent (New Spain). The definition of the boundary as contained in the treaty was construed by the Court in *United States* v. *Texas,* 162 U.S. 1, 16 S.Ct. 725, 40 L.Ed. 867 (1895) at 90, and the Court held:

> ". . . [I]t is ordered, adjudged, and decreed that the territory east of the 100th meridian of longitude, west and south of the river now known as the north fork of Red river, and north of a line following westward, as prescribed by the treaty of 1819 between the United States and Spain, the course, and along the south bank, both of Red river and of the river now known as the Prairie Dog Town fork or south fork of Red river. . . ."

This construction of the Treaty was followed and affirmed in *Oklahoma* v. *Texas,* 256 U.S. 70, 41 S.Ct. 420, 65 L.Ed. 831 (1921). The Court at page 93 held that the decision of the Court in *United States, supra,* was *res judicata* and binding on the parties in any subsequent suit between the states of Oklahoma and Texas, and that the southern boundary of Oklahoma was the south bank of the Red River for the entire course of the said river from the 100th degree of west longitude to the easterly boundary of Oklahoma.

Subsequently, this Court in *Oklahoma* v. *Texas,* 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687 (1923), provided a definition as to what constituted the south bank. Such definition at 341-42 was as follows:

> "The South bank of the river is the waterwashed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river, which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed, and to preserve the course of the river.
>
> "The boundary between the two states is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.
>
> "At exceptional places where there is no well-defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline, conforming to the mean level of the waters, when at other places in that vicinity they reach and wash the cut bank without over-flowing it."

As a result of the partial decree in the 1923 case and other partial decrees arising from the same controversy, a boundary commission was established to take evidence, find facts and report to this Honorable Court. In 1925 said Commission filed a documentary report styled as follows:

SUPREME COURT OF THE
UNITED STATES

October Term, 1925
No. 13, Original

THE STATE OF OKLAHOMA,
Complainant,
Vs.
THE STATE OF TEXAS,
Defendant,
THE UNITED STATES,
Intervenor.

THIRD REPORT OF THE
BOUNDARY COMMISSIONERS.

261 U.S. 340

At page 41 of the Report of the Boundary Commissioners appears the following entry:

VII.

IN
GRAYSON COUNTY, TEXAS,
OPPOSIVE
MARSHALL AND BRYAN COUNTIES,
OKLAHOMA.

Public Hearing:
Sherman, Texas, May 7, 1925

We found no avulsive changes in the position of the Red River in this County and make no surveys.

Thereafter in 1938 Congress authorized the construction by the United States Army Corps of Engineers at a

site north of the City of Sherman, Grayson County, Texas and some three miles southwest of Colbert, Bryan County, Oklahoma to furnish hydro-electric power and downstream flood control. Upon completion of construction and closing of the gates the resulting impoundment of waters primarily to the west and north formed Lake Texoma. The State of Oklahoma is unaware of the location of the south cut bank, the boundary as established by the Treaty of 1819. The river downstream of the power plant has been re-channeled, and Oklahoma is not aware as to where it is situated in proximity to the boundary as determined in the Treaty of 1819, and the Survey of 1908 by the United States Engineers' Office, Dallas, Texas, Red River Sheets 29, 30, 31, 32, 33, 34 and 35.

The Federal Energy Regulatory Commission (F.E.R.C.) is charged with the duty of regulating sales of electrical power in interstate commerce. 16 U.S.C. § 824 (1976). Under Docket No. EL-9578, the F.E.R.C., among other things, is attempting to adjudicate the location of the boundary between the States of Oklahoma and Texas. The State of Texas is a party-Intervenor in the F.E.R.C. proceeding. The State of Oklahoma is not a party-Intervenor in the F.E.R.C. proceeding. Oklahoma does not consider the F.E.R.C. a competent forum to determine the boundary or protect the State of Oklahoma from violation of its sovereign territorial rights by Texas. The State of Oklahoma notes that adjudication of such disputes between sovereign states is under the original and exclusive jurisdiction of this Court. The Constitution of the United States of America, Article III, Section 2; 28 U.S.C. § 1251(a)(1) (1976).

ARGUMENT AND AUTHORITY

I.

THERE IS AN ACTUAL JUSTICABLE CASE AND CONTROVERSY.

This Court has original and exclusive jurisdiction of a case or controversy between two or more states by virtue of the Constitution of the United States of America, Article III, Section 2 and 28 U.S.C. § 1251(a)(1) (1976). The instant case involves an actual controversy in that the boundary between Oklahoma and Texas was obliterated by building of Denison Dam and flooding by Lake Texoma. The impoundment of such waters obscures the location of the boundary as respects the Oklahoma counties of Marshall, Bryan and to a lesser extent Love. The State of Texas has the burden of showing any shift in the boundary due to accretion resulting from the building of the Denison Dam by the U.S. Corps of Engineers. The instant action is analogous in many ways to *Mississippi* v. *Arkansas,* 415 U.S. 289, 94 S.Ct. 1046, 39 L.Ed.2d 333 (1974). In that case the action was instituted by Mississippi against Arkansas due to the pendency of private litigation in the State Courts of Arkansas. The State of Oklahoma would respectfully submit that this Court has historically considered such boundary disputes to be obligatory in any case where there is an actual controversy. In the instant case the F.E.R.C. is purporting to adjudicate such dispute, a matter within the sole province of this Court, without all parties before it.

II.
THE COURT IS THE SOLE FORUM WITH JURISDICTION TO HEAR AND ADJUDICATE THE CONTROVERSY.

The State of Oklahoma has not intervened in the F.E.R.C. in Docket No. EL-9578 for reason that the F.E.R.C. has not been granted authority to hear and adjudicate such controversies. As a non-party, the decision of the F.E.R.C. does not and cannot bind the State of Oklahoma, if it can be assumed arguendo to have the authority to review such controversies. See *Oklahoma* v. *Texas,* 256 U.S. 70, 41 S.Ct. 420, 65 L.Ed. 831 (1921). The decision may, however, affect citizens of Oklahoma and will doubtless result in a filing of an original action in this Court to clear encumbrances from any actions by the F.E.R.C. purporting to affect the sovereign rights of Oklahoma or purport to allow Texas to invade such.

The State of Oklahoma would respectfully submit that by virtue of the Constitution of the United States of America, Article III, Section 2 and 28 U.S.C. § 1251(a)(1) (1976) this Court's authority in such cases and its exclusive grant of subject matter jurisdiction preclude any other forum from entering therein. *Durfee* v. *Duke,* 375 U.S. 106, 84 S.Ct. 242 (1963). See also *New York* v. *Connecticut,* 4 U.S. 1, 4 Dall. 1, 1 L.Ed. 715 (1799).

CONCLUSION

The State of Oklahoma suggests that there is an actual controversy involving a conflict of the sovereign interests of Oklahoma and Texas and that this Court is the only competent forum in which Oklahoma can obtain an adjudication of its interests.

Respectfully submitted,

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January, 1980

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS,
Plaintiff,

VERSUS

STATE OF OKLAHOMA,
Defendant.

ANSWER

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In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS,
Plaintiff,

VERSUS

STATE OF OKLAHOMA,
Defendant.

ANSWER

The State of Oklahoma, Defendant, by its duly elected, qualified and acting Attorney General, makes its Answer to the Complaint in this action brought by the State of Texas, Plaintiff, and states:

I.

The Defendant admits the allegations set forth in Paragraph I of the Plaintiff's Complaint filed and on file herein.

II.

The Defendant admits that the Plaintiff State of Texas was admitted to the Union by joint resolutions of Congress dated March 1, 1845 and December 29, 1845. 5 Stat. 797, 9 Stat. 108, respectively. The Defendant further admits that it was admitted into the Union by Act of June 16, 1906, 34 Stat. 267, ch. 3335. The Defendant would further allege and state that the southern boundary of the State of Oklahoma was established by virtue of the Treaty of

1819, 9 Stat. 252 (1821), as a part of the boundary between the United States and the possession of Spain on the North American Continent. The definition of the boundary, as contained in the Treaty, was construed by this Court in *United States* v. *Texas*, 162 U.S. 1, 16 S.Ct. 725, 40 L.Ed. 867 (1895). The southern boundary of Oklahoma is the "south cut bank" of the Red River as defined in *Oklahoma* v. *Texas*, 261 U.S. 340, 43 S.Ct. 376, 67 L.Ed. 687 (1923). This Treaty construction has been consistently followed in the various boundary disputes between the Defendant and Plaintiff. In *Oklahoma* v. *Texas*, 256 U.S. 70, 41 S.Ct. 420, 65 L.Ed. 831 (1921), this Court held that its decision in *United States* v. *Texas*, supra, was *res judicata* and binding upon the parties in any subsequent suit between the States of Oklahoma and Texas.

III.

The Defendant admits that on June 28, 1938, Congress enacted the Flood Control Act of 1938, 52 Stat. 1215, and that pursuant to such legislation, the construction of the Denison Dam was authorized by the United States Army Corps of Engineers. The Defendant further admits that the construction of Denison Dam began in 1939 and was completed by the United States Corps of Engineers in 1944. The Defendant neither admits nor denies the remaining allegations contained in Paragraph III of Plaintiff's Complaint for reason that it has insufficient knowledge as to the location of the south cut bank, the boundary established by the Treaty of 1819; and as to the location of the boundary below the Denison Dam, situated some three (3) miles southwest of Colbert, Bryan County, Oklahoma, for reason that the Red River was rechanneled and the De-

fendant has insufficient knowledge as to where the south cut bank of said river is presently situated in relation to the boundary as etsablished by the Third Report of The Boundary Commissioners (261 U.S. 340), and the Survey of 1908 by the United States Engineers' Office, Dallas, Texas, Red River Sheets 29, 30, 31, 32, 33, 34 and 35.

IV.

The State of Oklahoma, Defendant, neither admits nor denies the allegations of Paragraph IV of Plaintiff's Complaint for reason that it has insufficient knowledge as to the precise present location of the south cut bank of the Red River. Further, the Defendant asserts its territorial claims and sovereignty of and over all lands to the said south cut bank of the Red River and alleges that such boundary determination is as a matter of law *res judicata* in this instant action.

V.

The Defendant admits that the Federal Energy Regulatory Commission (FERC) is a federal agency empowered under the Federal Power Act, 16 U.S.C. § 824 (1976), to regulate sales of electrical power in interstate commerce. The Defendant further admits that under Docket No. EL-9578, the F.E.R.C. *inter alia*, is attempting to adjudicate the location of the boundary between the States of Oklahoma and Texas. The Defendant further admits that Plaintiff is a party-Intervenor in the F.E.R.C. and that the Defendant has not sought to intervene and is, therefore, not a party-Intervenor therein. The Defendant specifically denies that it has any duty or obligation to intervene in all F.E.R.C. proceedings and further denies that the F.E.R.C. is a compe-

tent forum to determine and decree the location of the boundary between the States of Texas and Oklahoma. The Defendant further alleges and asserts that the south cut bank of the Red River is as a matter of law *res judicata* as to the instant action, and that the Plaintiff herein has the burden of proof in showing any alleged change in such boundary due to accretion due to construction of the Denison Dam.

WHEREFORE, the Defendant, State of Oklahoma, respectfully requests that a decree be entered by this Honorable Court, in accordance with its historic precedents, declaring and determining the boundary between the State of Oklahoma and the State of Texas along the southern border of the Oklahoma counties of Marshall, Bryan and Love, and Grayson County, Texas, and that the State of Oklahoma be declared and determined to be the sovereign entitled by law to exercise jurisdiction and full dominion over all such area to the south cut bank of the Red River, and that the Plaintiff, State of Texas, has no sovereign right, title or interest in or to any of said lands or part thereof.

Respectfully submitted,

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April, 1980

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS, *Plaintiff*,

v.

STATE OF OKLAHOMA, *Defendant*.

MOTION OF TEXAS POWER & LIGHT COMPANY FOR LEAVE TO INTERVENE IN SUPPORT OF THE STATE OF TEXAS

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February 13, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS, *Plaintiff*,

v.

STATE OF OKLAHOMA, *Defendant*.

MOTION OF TEXAS POWER & LIGHT COMPANY FOR LEAVE TO INTERVENE IN SUPPORT OF THE STATE OF TEXAS

Texas Power & Light Company, by its counsel, asks leave of the Court to intervene in support of the State of Texas in the above entitled proceeding.

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Attorneys for
Texas Power & Light Company

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS, *Plaintiff*,

v.

STATE OF OKLAHOMA, *Defendant*.

MOTION OF TEXAS POWER & LIGHT COMPANY FOR LEAVE TO INTERVENE IN SUPPORT OF THE STATE OF TEXAS

STATEMENT IN SUPPORT OF MOTION

This proceeding was commenced by the State of Texas when it filed a Complaint stating that a dispute exists as to the boundary between the State of Texas and the State of Oklahoma in the vicinity of Lake Texoma. The State of Texas specifically asks that the boundary be established as the south cut bank of the Red River as it existed prior to the construction of the Denison Dam which forms Lake Texoma. The State of Oklahoma has responded, stating that "there is an actual controversy involving a conflict of the sovereign interests" of the two States.

This dispute first arose in a proceeding before the Federal Energy Regulatory Commission (FERC), *Texas Power & Light Company*, Docket No. E-9578, which involves the question of whether Texas Power & Light Company is subject to FERC's jurisdiction.* As a result of one issue raised in this proceeding, the FERC is seeking to adjudicate the boundary between Texas and Oklahoma at the Denison Dam.

The State of Texas is interested in this issue because if there is a determination that the border between Texas and Oklahoma has shifted southward, it would result in a loss of territory by the State of Texas. Texas Power & Light Company has an entirely separate and fundamental interest in this boundary determination.

Texas Power & Light Company purchases electric energy generated at the Denison Dam. If there is a finding that the power house at the Denison Dam, which was constructed in the State of Texas, is now located in the State of Oklahoma, it would result in electric energy crossing the Oklahoma-Texas state line and entering its facilities. This passage of energy in interstate commerce would subject Texas Power & Light Company and all interconnected electric utilities within the State of Texas to the jurisdiction of the FERC rather than sole regulation by the Public Utility Commission of Texas.

Such jurisdiction would change the method of operation employed by Texas Power & Light Company and other interconnected utilities and could imperil the

---

* Because no interstate energy enters or leaves the Texas Power & Light Company system, it never has been subject to the jurisdiction of FERC. As an intrastate utility, it is regulated by the Public Utility Commission of Texas.

reliability of service which these utilities render, as well as placing other burdens on their customers. For many years, the interconnected electric systems in the State of Texas have been constructed to enable them to operate most efficiently and reliably by utilizing facilities and rendering service entirely within the State of Texas. If the FERC were to achieve jurisdiction over Texas Power & Light Company, it could result in a massive disruption of this method of operation with major adverse consequences to Texas Power & Light Company and its customers.

Texas Power & Light Company agrees with the State of Texas that the construction of Denison Dam did not change in any manner the boundary between Texas and Oklahoma. The boundary remains the south cut bank of the Red River as it existed prior to the construction of the Dam.

However, as indicated, the interest of Texas Power & Light Company is quite distinct from that of the State of Texas. The State of Texas is concerned with its territorial integrity and Texas Power & Light Company with its status as a utility regulated by local authorities rather than the FERC. Consequently, Texas Power & Light Company's unique interest in this proceeding may not be adequately represented by existing parties.

The single issue before the Court, the location of the Texas-Oklahoma state line, is a basically simple one which Texas Power & Light Company does not desire to enlarge. Therefore, the granting of this motion will not delay nor unduly complicate this proceeding.

Wherefore, Texas Power & Light Company respectfully asks this Court for leave to intervene.

Respectfully submitted,

By .....

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February 13, 1980

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of this Motion for Leave to Intervene on the following:

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February 13, 1980

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No. 85, Original

IN THE

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STATE OF TEXAS, *Plaintiff*,

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STATE OF OKLAHOMA, *Defendant*.

SUPPLEMENTAL BRIEF OF TEXAS POWER & LIGHT COMPANY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE IN SUPPORT OF THE STATE OF TEXAS

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No. 85, Original

IN THE

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OCTOBER TERM, 1979

STATE OF TEXAS, *Plaintiff*,

v.

STATE OF OKLAHOMA, *Defendant*.

SUPPLEMENTAL BRIEF OF TEXAS POWER & LIGHT COMPANY IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE IN SUPPORT OF THE STATE OF TEXAS

On February 13, 1980, Texas Power & Light Company (TP&L) filed a motion to intervene in support of the State of Texas with a supporting statement in the above entitled original action. On August 29, 1980, the Special Master requested the States of Texas and Oklahoma to file, on or before October 1, 1980, responses to TP&L's motion to intervene and authorized TP&L to file a supplemental brief in support of its intervention. Specifically, the Special Master desired that the filings be directed to the question of "whether or when intervention of a private party is appropriate in original jurisdiction proceedings."

TP&L has a distinct and compelling interest in the outcome of the instant case, and, as an original principal in the underlying litigation, should be granted leave to intervene.

I. The Supreme Court's Rules Provide for Intervention By a Private Party In an Original Action

The Supreme Court's Rule 9, "Procedure in Original Actions" provides that the Federal Rules of Civil Procedure "may be taken as a guide to procedure." Rule 24(a)(2) of the Federal Rules of Civil Procedure, provides that intervention:

> shall be permitted . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

II. The Supreme Court on Several Occasions has Permitted Intervention by a Private Party in Original Actions

In an earlier proceeding involving the two parties to the instant case, *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), which also was concerned with the boundary formed by the Red River, numerous parties were permitted to intervene. The Supreme Court held that intervention should be permitted as a matter of fairness because the proceeding was the only one in which the intervenors' rights could be determined (258 U.S. at 581):

> Numerous parties have since intervened for the purpose of asserting rights to particular tracts in

the receiver's possession and are seeking to have the same and the net proceeds of the oil and gas taken therefrom surrendered to them. Many of these claims conflict one with another and all are in conflict with the claims of one or more of the three principal litigants.

[1] Under the Constitution (article 3, § 2), our original jurisdiction extends to suits by one state against another and to suits by the United States against a state. In its first stage this was a suit by one state against another. When the United States intervened it became also a suit by the United States against those states. In its enlarged phase it presents in appropriate form the conflicting claims of the two states and the United States to the river bed and calls for their adjudication. The other claims, being for particular tracts and funds in the receiver's possession and exclusively under our control, are brought before us because no other court lawfully can interfere with or disturb that possession or control. It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as ancillary to the suit wherein the possession is taken and the control exercised—and this although independent suits to enforce the claims could not be entertained in that court.

In another original action involving a boundary dispute between Texas and Louisiana, the City of Port Arthur, Texas [1] was permitted to intervene "for purposes of protecting its interests in the island claims of the United States". *Texas* v. *Louisiana,* 426 U.S. 466 (1976).

---

[1] While the City arguably is not a "private party", there is no indication it received special treatment because of its status as a city. As indicated, intervention was granted because of its interests in the proceeding.

More recently, on November 14, 1977, the Supreme Court upheld its Special Master in overruling an exception to his Report permitting several individuals to intervene in an original action. *South Dakota* v. *Nebraska*, 46 U.S.L.W. 3322 (1977). This ruling is particularly pertinent because the proceeding involved a boundary dispute between two states resulting from an alleged accretion caused by river currents which would change the boundary between them. The Special Master permitted the interventions because the interest of the individuals was different from that of the States. (See, "Report of Special Master and Recommendation" attached hereto as an appendix).

III. Texas Power & Light Company has a Distinct and Compelling Interest in This Original Action

This proceeding was commenced by the State of Texas when it filed a Complaint stating that a dispute exists as to the boundary between the State of Texas and the State of Oklahoma in the vicinity of Lake Texoma. The State of Texas specifically asks that the boundary be established as the south cut bank of the Red River as it existed prior to the construction of the Denison Dam which forms Lake Texoma. The State of Oklahoma has responded, stating that "there is an actual controversy involving a conflict of the sovereign interests" of the two States.

This dispute first arose in a proceeding before the Federal Energy Regulatory Commission (FERC), *Texas Power & Light Company*, Docket No. E-9578, which involves the question of whether TP&L is sub-

ject to FERC's jurisdiction.[2] In that proceeding, the FERC sought to adjudicate the boundary between Texas and Oklahoma at the United States Corps of Engineers' Denison Dam so as to determine if interstate energy entered or left the TP&L system. At issue before the FERC was the question whether construction of the Denison Dam had caused a change in the south bank of the Red River by accretion or by avulsion. After the FERC ordered an evidentiary hearing on that issue, the State of Texas petitioned to intervene in the FERC proceeding and moved to stay that proceeding, so as to allow this Court to make the boundary determination. After this Court accepted the Complaint filed by the State of Texas, the FERC granted the motion for stay of its proceeding insofar as the Texas-Oklahoma boundary was at issue.

The State of Texas is interested in this issue because if there is a determination that the border between Texas and Oklahoma has shifted southward, it would result in a loss of territory by the State of Texas. TP&L has an entirely separate and fundamental interest in this boundary determination.

TP&L purchases under long term contracts with the Southwestern Power Administration, substantial quantities of electric energy generated at the Denison Dam. If there is a finding that the power house at the Denison Dam, which was constructed in the State of Texas, is now located in the State of Oklahoma, then

---

[2] Because no interstate energy enters or leaves the TP&L system, it never has been subject to the jurisdiction of FERC. As an intrastate utility, it is regulated by the Public Utility Commission of Texas.

electric energy would cross the Oklahoma-Texas state line and enter TP&L's facilities. This passage of energy in interstate commerce would subject TP&L and all interconnected electric utilities within the State of ~~Oklahoma~~ Texas, to the jurisdiction of the FERC rather than sole regulation by the Public Utility Commission of Texas.

Such jurisdiction would change the method of operation employed by TP&L and other interconnected utilities and could imperil the reliability of service which these utilities render, as well as placing other burdens on their customers. For many years, the interconnected electric systems in the State of Texas have been constructed to enable them to operate most efficiently and reliably by utilizing facilities and rendering service entirely within the State of Texas. If the FERC were to achieve jurisdiction over TP&L, it could result in a massive disruption of this method of operation with major adverse consequences to TP&L and its customers.

TP&L agrees with the State of Texas that the construction of Denison Dam did not change in any manner the boundary between Texas and Oklahoma. The boundary remains the south cut bank of the Red River as it existed prior to the construction of the Dam.

However, as indicated, the interest of TP&L is quite distinct from that of the State of Texas. The State of Texas is concerned with its territorial integrity and TP&L with its status as a utility regulated by local authorities rather than the FERC. Consequently, TP&L's unique interest in this proceeding may not be adequately represented by existing parties.

IV. Texas Power & Light Company's Intervention in This Proceeding is Necessary Because It is so Situated that the Disposition of this Action May as a Practical Matter Impair or Impede Its Ability to Protect Its Interest

As previously indicated, Rule 24 of the Federal Rules of Civil Procedure provides for intervention by a private party in an original action proceeding where the applicant for intervention "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect [his] interest" in the proceeding. The Supreme Court is the only forum where boundary disputes between states can be adjudicated. For that reason, the Court, on at least three occasions involving such boundary disputes, has permitted intervention by outside parties where, as here, the applicant for intervention's ability to protect his interest otherwise would be "impair[ed] or impede[d]". These interventions were granted in proceedings in which the fact situations were remarkably similar to that in the instant case.

In *Oklahoma* v. *Texas, supra,* intervention was granted to numerous parties because the Supreme Court recognized that there was no other forum for them to protect their interests. Here, because the Supreme Court is the only forum available to litigate the sole issue in this case, the location of the Texas-Oklahoma state line, TP&L is in the identical position of the intervenors in *Oklahoma* v. *Texas.* The Supreme Court is the only place in which TP&L can protect its interests.

There is a difference between the cases, however, which lends even greater support to TP&L's interven-

tion. In *Oklahoma* v. *Texas,* there were "numerous intervenors" which could expand the scope of the proceeding beyond the original action concept. Here, there is only one intervenor with no intention of expanding the scope of the proceeding, and there is no present prospect of additional intervenors.

Both *Texas* v. *Louisiana* and *South Dakota* v. *Nebraska,* like the instant proceeding, involve boundary disputes between States. As indicated at page 4, *supra,* the *South Dakota* case is particularly pertinent because the issue of a boundary change resulting from alleged accretion caused by river currents is identical to the issue that underlies the instant case. In the *South Dakota* case the intervenors' interest involved land title and the States were concerned with sovereignty. Here, the States are concerned with sovereignty and TP&L's interest involves its jurisdictional status which, if anything, is even further removed from the interest of the States than was the case in the *South Dakota* proceeding.

Finally, it should be pointed out that TP&L was the party below that originally opposed the concept of a change in the State boundary resulting from alleged accretion of the banks of the Red River. TP&L vigorously opposed such a change because it was vital to its particular interest. The State of Texas has brought this action because it correctly submits that only the Supreme Court can adjudicate a State boundary determination. However, equity demands that TP&L, the original party below with a vital interest in the boundary determination, should be permitted to pursue its

interest before the Supreme Court, the only forum capable of making such a determination.

Wherefore, Texas Power & Light Company respectfully submits that there is ample precedent to support its motion for leave to intervene.

Respectfully submitted,

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October 1, 1980

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October 1, 1980

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 72 Original

STATE OF SOUTH DAKOTA,
Plaintiff,

v.

STATE OF NEBRASKA,
Defendant.

Received June 10, 1977

REPORT OF SPECIAL MASTER AND RECOMMENDATION

In its Order, entered October 4, 1976, the Supreme Court of the United States, on consideration of the Motion for Leave to file a Bill of Complaint, granted the Motion of the plaintiff and allowed the State of Nebraska, defendant, thirty (30) days in which to answer.

On November 22, 1976, Robert J. Foley, Phyllis K. Foley, and Otto Isaak filed a Motion for Leave to Intervene as defendants in intervention and brief in intervention as defendants. In its Order of December 6, 1976, appointing the Honorable Oren Harris, Senior Judge, United States District Court for the Western District of Arkansas, Special Master in the case, the Court referred the Motion of Robert J. Foley, et al., for leave to intervene to the Special Master.

On January 26, 1977, the Special Master advised counsel for the parties that it is well established that procedures governing the exercise of the Supreme Court's original jurisdiction are not invariably governed by common-law precedent or current rules of civil procedure. United States Supreme Court, Rule 9. The parties were further advised that the Federal Rules of Civil Procedure, where appro-

priate, may be used as a guide as to procedure which will be utilized by the Special Master.

On the Motion of Robert J. Foley, et al, for leave to intervene as defendants and to file Complaint in Intervention, the Special Master directed counsel for the parties to file briefs with the Special Master. Such briefs have been received from counsel for the parties. Consideration has been given to the contentions of the parties on the Motion and, pursuant to reference of the Motion for Leave to Intervene to the Special Master by the Court, this report is submitted with the recommendation that an Order be entered granting leave to file complaint in intervention and that the intervenors be designated parties defendant in the case.

The stated purpose of the litigation is to determine jurisdiction between the States of South Dakota and Nebraska over an Island situated in the Missouri River, which forms the boundary between the States. The interest of South Dakota and Nebraska is to determine and protect their boundaries and sovereignity over real property within those boundaries against any encroachment.

From the record and briefs filed with the Special Master, there are approximately 994 acres involved in the dispute. The Movants (intervenors) contend they are the owners and in possession of the property to which their remote grantors acquired record title by patent dated March 28, 1865, consisting of approximately 147.65 acres and to which have been added accretions from the Missouri River until the Island and accretions have developed into the land mass presently in dispute. Intervenors contend that the real estate is now and at all times has been located in the State of Nebraska. The intervenors claim that the disposition of the dispute between the States may impair or impede their ability to protect their interest unless adequately represented as intervenors in the litigation.

The intervenors are citizens of South Dakota. The record discloses that there is a probable conflict between the intervenors and the State of South Dakota as to the ownership of the property. It is claimed, and with good reason, that, should South Dakota prevail and it be determined that the Island is located within the State of South Dakota, the State, by its appropriate agency, would claim title to the lands against the Movants.

The primary interest of the State of Nebraska is to protect its boundaries and sovereignty, without regard to the ownership of the property.

The intervenors' claims and defenses as to the major questions of law or fact are in common with those asserted by the defendants and, in the opinion of the Special Master, the exercise of the Court's discretion in permitting intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

In submitting this report, the Special Master respectfully recommends that the Motion of Robert J. Foley, Phyllis K. Foley, and Otto Isaak for leave to intervene as defendants and to file Complaint in Intervention be granted and that an Order be entered by the Court accordingly.

DATED this 8th day of June, 1977.

/s/ OREN HARRIS
Oren Harris
SPECIAL MASTER

Supreme Court, U. S.
FILED
OCT 8 1980
MICHAEL RODAK, JR., CLERK

NO. 85, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

STATE OF TEXAS,

Plaintiff

V.

STATE OF OKLAHOMA,

Defendant

* * *

RESPONSE OF THE STATE OF TEXAS TO MOTION FOR LEAVE TO INTERVENE OF TEXAS POWER & LIGHT COMPANY

* * *

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INTERESTED PARTIES

1. The State of Texas, by and through its Attorney General, the Honorable Mark White and Leon J. Barish, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

2. The State of Oklahoma, by and through its Attorney General, the Honorable Jan Eric Cartwright, and John Percival, Assistant Attorney General, Office of Attorney General, State Capitol, Oklahoma City, Oklahoma 73105.

3. Texas Power and Light Company, and its attorneys of record Jeb Loveless, Burford & Ryburn, 1511 Fidelity Union Life Building, Dallas, Texas 75201; and Harry A. Poth, Jr., Peyton G. Bowman, III, Reid & Priest, 1111 19th Street, N.W., Washington, D.C. 20036.

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NO. 85, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

STATE OF TEXAS,

Plaintiff

V.

STATE OF OKLAHOMA,

Defendant

* * *

RESPONSE OF THE STATE OF TEXAS TO MOTION FOR LEAVE TO INTERVENE OF TEXAS POWER & LIGHT COMPANY

* * *

The State of Texas, by its Attorney General, makes its Response to the Motion for Leave to Intervene filed with the Court in this Action by Texas Power & Light Company, and states:

I.

The State of Texas neither supports nor opposes the Motion of Texas Power & Light Company (TPL) to intervene in this action. We do not believe TPL's intervention will unduly delay the resolution of this matter nor will it prejudice the rights of either party. We do not believe, however, that TPL has met the standard in the law governing intervention in original actions necessary to grant its application.

II.

The Rules of the Supreme Court do not specifically provide for intervention in original actions by third parties. Supreme Court Rule 9 does provide, however, that "motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions. . . ." Thus, the Federal Rules of Civil Procedure must be consulted as a guide for the proper disposition of TPL's Motion for Leave to Intervene.

Federal Rules of Civil Procedure 24 provides for intervention of right and permissive intervention. Anyone is permitted to intervene in an action when such right is conferred by statute or the applicant claims an interest relating to the matter which is being litigated and the applicant's interest is not adequately represented by existing parties. Fed.R.Civ.P. 24(a). Anyone may be permitted to intervene when an applicant's claim or defense and the main action have a question of law or fact in common. Fed.R.Civ.P. 24(b). In considering a motion for permissive intervention, a court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Supreme Court may exercise its discretion in accepting jurisdiction of original actions where an actual case or controversy is in doubt. *See New Mexico v. Texas*, 444 U.S. 895 (1979); *California v. Texas*, 437 U.S. 601 (1978). It follows that the Court may exercise even greater latitude in disposing of a motion to intervene in an original action. Although no case has ruled directly on the issue, it seems that the application of Fed.R.Civ.P. 24(a) regarding intervention of right would not be appropriate in considering a motion to intervene in an original action. Such application would

deprive the Court of its discretion in granting leave to intervene. Consequently, only intervention at the discretion of the Court should be appropriate in original actions.

III.

The few cases dealing with intervention in original actions seem to confirm this interpretation of the appropriate application of Fed.R.Civ.P. 24. The Court has permitted intervention where the applicant has a property interest at stake relating to the subject matter of the action. The Court has denied intervention, however, where no property interest is at issue or the applicant's interests are adequately represented by other parties.

In *Oklahoma v. Texas*, 252 U.S. 372 (1920), this Court authorized private parties to intervene in a boundary dispute to assert claims to land in the disputed area and proceeds from the sale of oil and gas produced therefrom. Neither State nor the United States, an additional intervenor, could represent the interests of these private parties because the sovereigns themselves also claimed the disputed property. Thus, the Court recognized the necessity of permitting intervention in that situation.

In *Utah v. United States*, 394 U.S. 89 (1969), this Court denied leave to intervene to a private party in a dispute over ownership of the Great Salt Lake and surrounding relicted lands. The parties to the action limited the issue in the case by stipulation so that the presence in the case of private property owners asserting claims to the disputed property was "neither necessary nor appropriate." *Id.* at 763. The private parties were claiming lands also claimed by both sovereigns. The stipulation provided for means of settling the claims of the sovereigns regardless of the claims of the private parties. This Court held that the private parties could

assert their claims in another forum and that Utah could waive (which it did) the protection of Fed.R.Civ.P. 19(a) concerning joinder of parties and the incurring of multiple obligations. Thus, even where a private party has a legitimate interest related to the subject matter of the original action, the Court in its discretion may deny leave to intervene. It should also be noted that the Court was concerned with the lack of complete diversity of citizenship if the applicant in *Utah v. United States* were permitted to intervene.

In its clearest explication of the standard to be met for intervention in an original action, this Court in *New Jersey v. New York*, 345 U.S. 369 (1953), denied leave to intervene to the City of Philadelphia. This case concerned the distribution of Delaware River water. The State of Pennsylvania successfully intervened in the action, demonstrating a necessity for specific relief. The City of Philadelphia then sought to intervene, asserting its interest in the Delaware River. This Court denied the application on the grounds that Philadelphia and its residents were already represented in the case by the State of Pennsylvania. Relying on the *parens patriae* doctrine, this Court stressed that a State represents all its citizens in a suit involving a matter of sovereign interest. The doctrine is necessary "as a working rule for good judicial administration." *Id.* at 373. Otherwise, there would be no limit on the number of citizens entitled to intervene. If Philadelphia were permitted to intervene, other municipal and industrial corporations would want to come in and assert their legitimate interests in the water.

The Court expressed in *New Jersey v. New York, Id.*, the appropriate standard for intervention for applicants such as TPL.

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart

> from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

TPL seeks the same adjudication of the Texas-Oklahoma boundary at Lake Texoma that is sought by the State of Texas. The only factor which distinguishes TPL's interest from that of Texas is the reason behind it. TPL purchases electric power from the Corps of Engineers hydroelectric project at Denison Dam on Lake Texoma. TPL has a legitimate interest in making sure the powerhouse in which the electric power is generated is in Texas to avoid regulation by the Federal Energy Regulatory Commission. TPL's regulatory status, however, is only remotely related to the real issue in this action. It is not a property interest nor is TPL's contractual right to the purchased electric power. Thus, the only interest of TPL cognizable by this Court in this action is the proper adjudication of the Texas-Oklahoma boundary as sought by Texas. This interest is not imbued with any special character which cannot be represented and protected by the State of Texas. If TPL were permitted to intervene in this action on the grounds asserted in its Motion, its customers and other electric utilities to which it is interconnected would have to be permitted to intervene. This situation is what the *New Jersey v. New York* Court sought to avoid.

WHEREFORE, the Plaintiff, State of Texas, neither supports nor opposes TPL's Motion for Leave to Intervene, but recognizes it should probably be denied on the basis of the law governing such applications to this Court.

Respectfully submitted,

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Attorney General of Texas

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First Assistant Attorney General

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Justin Andrew Kever, Assistant Attorney General of Texas, hereby certify that a true and correct copy of the above and foregoing has been served by placing same in the United States mail, postage prepaid, on this the _____ day of _____, 1980, addressed to counsel of record.

_____
JUSTIN ANDREW KEVER

Supreme Court, U. S.
FILED
OCT 27 1980
MICHAEL RODAK, JR., CLERK

No. 85, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF TEXAS,
Plaintiff,

VERSUS

STATE OF OKLAHOMA,
Defendant.

MEMORANDUM ON PRIVATE PARTY INTERVENTION IN ORIGINAL JURISDICTION PROCEEDINGS

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Attorneys for Defendant,
The State of Oklahoma

October, 1980

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MEMORANDUM
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PRELIMINARY STATEMENT

The State of Oklahoma has maintained throughout this litigation that the boundary between the State of Texas and the State of Oklahoma is the "South Cut Bank" of the Red River. Furthermore, the State of Oklahoma has never attempted to exercise jurisdiction over the Denison Dam Generating Station nor has it taken a position as to whether Texas or the Federal Energy Regulatory Commission (FERC) should regulate the Generating Station or its customers.

Therefore, the State of Oklahoma has no specific objection to or desire of Texas Power and Light Company's intervention in support of the State of Texas. However, to aid the Special Master in deciding whether to grant the

intervention requested by Texas Power and Light Company, the State of Oklahoma hereby submits the following views and authorities.

ANALYSIS

The question of intervention in original actions has been addressed several times by the Supreme Court. In *Kentucky* v. *Indiana*, 281 U.S. 163, 50 S.Ct. 275, 74 L.Ed. 784 (1929), a private citizen sought intervention in an original action between states concerning a contractual matter. The Court pointed out that,

> "A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point. Citizens, voters and taxpayers, merely as such, of either state, without a showing of any further and proper interest have no separate individual right to contest in such a suit the position taken by the state itself." (281 U.S., at 173)

Thus, it appears that a state represents the interests of all its citizens in original jurisdiction cases. This result is further emphasized by the Court in *New Jersey* v. *New York*, 345 U.S. 369, 73 S.Ct. 689, 97 L.Ed. 1081 (1953). In that case, the City of Philadelphia filed a motion for leave to intervene. The Court, after noting that the Commonwealth of Pennsylvania had been granted leave to intervene, stated:

> "Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest

in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." (345 U.S. 373, 374)

Again, where a state is a party, it is presumed to be representing its inhabitants. However, there also appears to be an exception to this general rule. In *Oklahoma* v. *Texas*, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771 (1922), an original action concerning the southern boundary of Oklahoma along the Red River, the Court allowed intervention by private parties. Private parties who had property interests and oil and gas interests in the land lying under the Red River were permitted intervention since the tracts and funds were in a receiver's possession and under the Suprme Court's exclusive control and thus no other court could lawfully disturb or interfere with that possession.

The interests asserted by the states were not necessarily the same interests being asserted by the private parties. The Court held that claims to property in possession of a court may be dealt with as ancillary to the suit wherein possession is taken even though independent suits to enforce the claims could not be entertained in that court (258 U.S., at 581).

Thus, where a private party clearly asserts rights different or adverse to the state's position in the action, intervention may be allowed. The intervention, if it is to be allowed in a case, is a matter of discretion with the Court. A more recent Supreme Court decision acknowledging private party intervention, yet disallowing it in the case, is *Utah* v. *United States*, 394 U.S. 89, 89 S.Ct. 761, 22 L.Ed.2d 99 (1969). Lands under the Great Salt Lake were involved

in the original action. The State of Utah claimed ownership of lands in the lake's bed. The United States claimed title to the lands exposed due to reliction, this being part of the land also claimed by Utah. The private party also asserted a claim to certain of the relicted lands and sought intervention as a party defendant. The United States and the State of Utah entered into a stipulation limiting the issues in the case and the Supreme Court held that presence of private landowners was therefore neither necessary or appropriate. The Court noted that absent the stipulation, the private intervenor's motion for leave to intervene would have had a more substantial basis. Having no duty to allow the intervention for the purposes of raising issues that were not raised by the sovereigns concerned, the Court denied the leave to intervene. The Court reaffirmed that the question of private party intervention was one of discretion to be exercised in light of the policy of having the original jurisdiction of the Supreme Court invoked only sparingly.

A few concrete principles thus emerge from the abovementioned cases. First, a state in an original action in the Supreme Court presumably represents its citizens and creatures and their interests in the suit. Second, prior to allowing a private party to intervene, the private party must show some compelling interest that is not within the interests of all other citizens and creatures of the state. Additionally, the sovereigns may, by stipulation, limit the issues to be heard by the Court, and thus preclude the private party from raising additional issues by way of intervention. Lastly, when a private party asserts an interest which may be adversely affected by the proceeding

continuing without him, the Court may grant the intervention through the sound exercise of its discretion.

In the instant case, Texas Power and Light Company, in their motion for leave to intervene, states that they agree with the State of Texas that the dam construction did not change the boundary between Texas and Oklahoma. (Intervenor Motion, at 3). The State of Texas, in their motion for leave to file complaint, in effect limits the issue in this Court to a reestablishment of the boundary as it existed prior to the dam being constructed. In their prayer for relief they request,

> "The State of Texas prays that a decree be entered declaring the boundary between the State of Texas and the State of Oklahoma . . . [and] that the State of Texas be declared to be the sovereign over said area. . . ." (Texas Complaint, at 4)

The State of Oklahoma, in its answer filed in April 1980, requests a decree declaring and determining the boundary between the State of Oklahoma and the State of Texas and that the State of Oklahoma be entitled to exercise jurisdiction over such area to the south cut bank of the Red River.

Thus, it appears that the sovereigns in the litigation have limited the lawsuit to the issue of reestablishing a prior-determined boundary line. This situation is analagous to the situation in *Utah* v. *United States,* supra, where private party intervention was withheld.

However, for the Court's further information, an alternative to intervention does exist that would allow some participation on behalf of Texas Power and Light Company

should this Court desire such participation. Rule 42 of the Supreme Court Rules of Practice found in 28 U.S.C. provides for the filing of briefs as an *amicus curiae*. Specifically, Rule 42, subsection (2), states that the Court can issue an order allowing an individual to file such a brief or a brief may be presented after having obtained the consent of all the parties. The question of filing an *amicus curiae* brief would, in this case, need not be addressed until some decision on the intervention motion has been made by this Court.

In any event, the State of Oklahoma submits that should this Court, through the sound exercise of its discretion, determine that the Texas Power and Light Company has asserted such a compelling interest so as to differ from the citizens, voters, creatures or taxpayers of the State of Texas, the grant of intervention would be proper and without objection by the State of Oklahoma.

Respectfully submitted,

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

JOHN F. PERCIVAL
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Attorneys for Defendant,
The State of Oklahoma

October, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 1980, true and correct copies of the foregoing were served by placing same in the U. S. Mail, postage fully prepaid, and addressed to the following:

John A. Carver, Jr., *Esq.*
Special Master
730 Seventeenth Street
Suite 600
Denver, Colorado 80202

Mark Wells White, Jr.
Attorney General of Texas

Leon Barish
Assistant Attorney General
P. O. Box 12548, Capitol Station
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1511 Fidelity Union Life Bldg.
Dallas, Texas 75201

Attorneys for Texas Power & Light Company

All parties required to be served have been served.

_____
John F. Percival

Office-Supreme Court, U.S.
FILED
JAN 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 85, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF TEXAS, *Plaintiff*,

v.

STATE OF OKLAHOMA, *Defendant*.

REPORT OF SPECIAL MASTER ON MOTION OF TEXAS POWER AND LIGHT COMPANY TO INTERVENE

John A. Carver, Jr.
Special Master

600 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202

In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS, *Plaintiff,*

v.

STATE OF OKLAHOMA, *Defendant.*

REPORT OF SPECIAL MASTER ON MOTION OF TEXAS POWER AND LIGHT COMPANY TO INTERVENE

January 23, 1981

The Supreme Court has referred to the Special Master the Motion of Texas Power and Light Company ("TP&L"), for leave to intervene in this original jurisdiction proceeding. This action was initiated by the State of Texas to resolve the location of a portion of its boundary with the State of Oklahoma along the Red River. The boundary between the states from the 100th meridian of longitude to the eastern border of Oklahoma is the south bank of the Red River. The issue in this suit is what constitutes the south bank of the river in the vicinity of Denison Dam near Denison, Texas.

The Texas-Oklahoma boundary has been the subject of numerous lawsuits. The Red River originally formed the boundary between the United States and the Spanish possessions, pursuant to the Treaty of 1819, 8 Stat. 252 (1821). In *United States v. Texas,* 162 U.S. 1 (1896), the Supreme Court construed the boundary definition of the Treaty as establishing the boundary between the Oklahoma Territory and the State of Texas as the south cut bank of the Red River. In *Oklahoma v. Texas,* 256 U.S.

70 (1921), the Court held that the admission of Oklahoma to statehood in 1906 did not affect this boundary. The Supreme Court provided a definition of what constitutes the south bank of the Red River in its partial decree in *Oklahoma v. Texas*, 261 U.S. 340 (1923). Both states agree that these prior decisions are *res judicata* and will form the basis for a determination of the present controversy.

In 1938 Congress authorized the construction of Denison Dam on the Red River, at a point approximately 5 miles north of the City of Denison in Grayson County, Texas. Flood Control Act of 1938, 52 Stat. 1215 (1938). The construction of the dam resulted in the formation of Lake Texoma west of the dam site. The lake is approximately 25 miles long and covers the former channel of the Red River. East of the Denison Dam the river was rechannelled for approximately one-half mile to accommodate hydroelectric facilities. The issue in this case is whether the impoundment of water in Lake Texoma and the rechannelling of the Red River below Denison Dam have altered the south bank of the river and thereby affected the boundary between Texas and Oklahoma. Texas asserts that the boundary remains the south cut bank of the river as it existed prior to the construction of Denison Dam. If TP&L were allowed to intervene, it would support this position. Oklahoma has not taken a definitive position as to the location of the boundary, other than to assert that the location of the south bank was rendered uncertain as a result of the construction of the dam.

The effect of the construction of Denison Dam on the Oklahoma-Texas boundary was first raised in a proceeding before the Federal Energy Regulatory Commission ("FERC"), concerning jurisdiction of the FERC over TP&L. *Texas Power and Light Company*, FERC Docket No. EL-9578. The FERC is authorized under the Federal Power Act to regulate the sale of electricity in interstate commerce. 16 U.S.C. § 824 (1976). TP&L purchases elec-

tricity generated at Denison Dam, from the Southwestern Power Administration, a part of the Department of Energy, U.S. Government, which it then sells to private customers and interconnected utilities, all of whom are located within the State of Texas. TP&L has historically been considered a purely intrastate utility not subject to FERC jurisdiction.

One issue raised in the FERC proceeding is whether the power generating house at Denison Dam is located in the State of Texas or the State of Oklahoma. The power house was constructed on the Texas side of the Red River as the river existed prior to the construction of Denison Dam. The FERC, however, has been urged to take the position that the boundary was changed by the construction of the dam and that the new boundary is the south shore of Lake Texoma and the south bank of the rechannelled portion of the river below the dam. If this contention were correct, the power house would be located north of the state line, in Oklahoma, and TP&L could be considered to be engaged in the interstate transmission of electricity and to be subject to the FERC's jurisdiction.

Texas intervened in the FERC proceeding and moved for a stay pending termination of this litigation. The stay was granted. TP&L has now moved to intervene in this action. It contends that it should be permitted to intervene because it has a distinct and compelling interest in being regulated by the Texas Public Utilities Commission and not by the FERC, which interest may not be adequately represented by the State of Texas, and because it was a principal in the underlying FERC proceeding.

The Special Master has considered briefs submitted by the states and by TP&L. Both states conclude that TP&L is not entitled to intervene in this proceeding. The Special Master agrees with this conclusion and recommends that the Motion of TP&L to Intervene be denied. In reaching this recommendation, the Special Master is guided by several prior Supreme Court decisions.

When the original jurisdiction of the Supreme Court is invoked by a state, that state is deemed to represent the interests of all of its citizens in the litigation. *Kentucky v. Indiana*, 281 U.S. 163 (1930). Unless a party can demonstrate a compelling interest in its own right, which is not properly represented by the state, intervention should not be allowed. *New Jersey v. New York*, 345 U.S. 369 (1953). TP&L relies primarily upon three cases in which intervention was allowed because the intervenors had a compelling interest in the subject matter of the litigation which was adverse to one or more of the sovereign parties.

South Dakota v. Nebraska, 429 U.S. 810 (Motion to File Complaint granted Oct. 4, 1976), is an original proceeding to determine state jurisdiction over an island in the Missouri River. The river forms the boundary between the two states. The purported private owners, who are in possession of the island, have made claims to title which are adverse to South Dakota. The Court has allowed the private owners to intervene in the action and assert their claims. *Id.*, 434 U.S. 948 (1977). *See*, TP&L Brief, Appendix, for text of Special Master's Report. Similarly, in *Texas v. Louisiana*, 426 U.S. 466 (1976), a boundary case brought to determine the lateral seaward boundary between Texas and Louisiana, the City of Port Arthur, Texas was allowed to intervene to protect its interests in the island claims asserted by the United States.

In *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Supreme Court was faced with conflicting claims by Oklahoma, Texas and the United States to ownership of the south half of the bed of the Red River. Numerous private parties were allowed to intervene to assert their claims to the disputed land and to proceeds from the sale of oil and gas produced therefrom. The Court allowed intervention because the claims of the private parties were adverse to each other and to one or more of the principal litigants and because the parties had no other forum in which to assert their claims. 258 U.S. at 581.

The position of TP&L in this matter differs substantially from that of the intervenors in the above-cited cases. TP&L has asserted no adverse claim to property which might be affected by a change in the state line, nor has it asserted any claim against either state which could properly be considered in determining the present location of the state line. Indeed, TP&L's Motion and Supplementary Brief leave no doubt that TP&L's argument is with the FERC and not with either of the states. This is an action to determine an interstate boundary. It is not an administrative review proceeding. The only interest of TP&L cognizable by the Court in this original action is the proper adjudication of the Texas-Oklahoma boundary. On this issue TP&L seeks the same determination as Texas, and for aught the Special Master can determine from the pleadings, the same determination as Oklahoma. TP&L's interest in such a determination is not imbued with any special character, apart from that of other citizens and creatures of the State of Texas, which cannot be represented and protected by that state.

If TP&L were allowed to intervene and make its regulatory status an issue in this boundary dispute, then fairness would dictate that other parties in the FERC proceeding, including the staff of the FERC, also be given an opportunity to intervene to present their views on the regulatory issue. The matter would not end there, however, because each interconnected utility and conceivably all utility customers would also be entitled to intervene and present their views.

The original jurisdiction of the Supreme Court is to be invoked sparingly. As noted in *New Jersey v. New York*, 345 U.S. 369, 373 (1953), this jurisdiction should not be expanded to the dimensions of an ordinary class action merely to accommodate every party who may be collaterally affected by a decision in the case. In *New Jersey v. New York*, the Court refused to permit the City of Philadelphia

to intervene because the city failed to establish a compelling interest in its own right, apart from its interest in a class with all other citizens and creatures of the state, which was not properly represented by its sovereign. Likewise, in *Utah v. United States,* 394 U.S. 89 (1969), the Court refused to permit intervention for the sole purpose of permitting a private party to introduce new issues which were not raised by the sovereigns directly concerned.

The Special Master believes these two cases are controlling in the instant situation and accordingly recommends that the Motion of Texas Power and Light Company to Intervene on behalf of the State of Texas be denied.

DATED at Denver, Colorado, January 23, 1981.

John A. Carver, Jr.
Special Master

600 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202

Office-Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 85, Original

THE STATE OF TEXAS,

Plaintiff,

V.

THE STATE OF OKLAHOMA,

Defendant.

MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

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IN THE
SUPREME COURT OF THE UNITED STATES
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THE STATE OF TEXAS,

Plaintiff,

V.

THE STATE OF OKLAHOMA,

Defendant.

MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

COME NOW the State of Texas and the State of Oklahoma by and through their respective Counsel of record and move this Honorable Court to enter judgment in this action by consent of the Plaintiff and Defendant as specified hereunder.

Counsel for Plaintiff, the Attorney General of Texas, Mark White, and Counsel for Defendant, the Attorney General of Oklahoma, Jan Eric Cartwright, represent to the Court that after long and careful study of the issues in dispute, they have come to agreement as to the pertinent facts and the applicable legal principles determinative of this action. Counsel for the States have concluded that it is in the best interest of each State and of the Court to dispose of this action by a judgment as specified hereunder.

WHEREFORE, the Plaintiff and Defendant, by and through their respective Counsel, move the Court to

enter the following judgment, each party hereby consenting thereto:

(1) This judgment determines the boundary line between Texas and Oklahoma along the South bank of the Red River in Grayson County, Texas, from a point on said River as it existed prior to the construction of the Texoma Reservoir Dam (Denison Dam) approximately 1973 feet West of the center line of said Dam, with its meanders, to a point on said River approximately 6103 feet East of the center line of said Dam, upon the Complaint, Answer and agreement of Counsel for Texas and Oklahoma.

(2) The source of the boundary line between Texas and Oklahoma from the 100th meridian of longitude to the eastern border of Oklahoma (which encompasses the boundary determined by this judgment) lies in the Treaty of 1819, 8 Stat. 252 (1821), which was construed by the Court in *United States v. Texas*, 162 U.S. 1 (1895), to be the south bank of the Red River. The Court later confirmed this definition of the boundary in *Oklahoma v. Texas*, 256 U.S. 70 (1921), and in a later partial decree therein, 261 U.S. 340, 341-42 (1923), defined the South bank as:

> ...the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river, which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed, and to preserve the course of the river.
>
> The boundary between the two states is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

> At exceptional places where there is no well-defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline, conforming to the mean level of the waters, when at other places in that vicinity they reach and wash the cut bank without overflowing it.

(3) As a result of the partial decree in 1923 and other partial decrees arising from the same controversy, a boundary commission was established to take evidence, find facts and report to the Court. Said Commission filed a documentary report, 269 U.S. 536 (1925), styled as the Third Report of the Boundary Commissioners. At page 41 of said Report appears the following entry:

VII.

IN
GRAYSON COUNTY, TEXAS,
OPPOSIVE
MARSHALL AND BRYAN COUNTIES,
OKLAHOMA.

Public Hearing:
Sherman, Texas, May 7, 1925

We found no avulsive changes in
the position of the Red River in
this County and make no surveys.

(4) In 1939 the United States Army Corps of Engineers made surveys of certain tracts of land in Grayson County, Texas, known as Tract T-2-1, Tract T-2-2 and Tract T-2-4, whose northern boundaries coincide with the South bank of the Red River and the boundary determined by this judgment. Said surveys were made in anticipation of the condemnation of said Tracts for purposes of the construction of the Texoma

Dam Facility and Reservoir pursuant to an Act of Congress, 52 Stat. 1215 (1938). True and accurate reproductions of the original plats of said surveys are filed herewith as Appendices A-1, A-2 and A-3.

(5) On September 7, 1940, a judgment was entered in the United States District Court for the Eastern District of Texas making final the award of special commissioners as to Tract T-2-1. On November 23, 1940, judgment was entered in the United States District Court for the Eastern District of Texas making final the acquisition by the United States of Tract T-2-4. On December 28, 1939, a warranty deed was executed by P. O. Brack to the United States as to Tract T-2-2. Certified copies of said judgments and warranty deed, all containing descriptions of the property therein conveyed, are filed herewith as Appendices B-1, B-2 and B-3.

(6) On June 23, 1980, the Plaintiff and Defendant together retained a Registered Public Surveyor of the State of Texas to make a reenactment survey of Tract T-2-1, Tract T-2-2 and Tract T-2-4. On the basis of such survey it has been determined that, when tying back to the original South bank of the Red River, the northern boundaries of Tracts T-2-1, T-2-2 and T-2-4 (coinciding with the South bank of the Red River), as established by the U.S. Army Corps of Engineers in its survey of 1939 were correct at the time that survey was made, which was prior to the construction of the Texoma Reservoir Dam Facility. A certified copy of the plat of the survey commissioned by the States with the surveyor's certified explanation thereof is filed herewith as Appendices C-1 and C-2.

(7) The boundary between Texas and Oklahoma determined by this judgment coincides with the boundaries of Tracts T-2-1, T-2-2 and T-2-4 and is described as follows, with all bearings from the above referenced

judgment and deed descriptions, and all distances in feet:

BEGINNING at the Northwest corner of Tract T-2-1, from which the Southwest corner of the Daniel Dugan, Jr. Survey, dated January 9, 1840, bears S.4°-29'E.4313.1 feet, the same being identified on the Texas Co-ordinate System, North Central Zone as x=2,280,317.495 and y=785,284.349.

THENCE down the south bank of the Red River as it existed prior to the construction of the Texoma Reservoir and Denison Dam, with its meanders; S.55°-54'E.1030.8 feet; S. 68°-27'E.362.2 feet; S.87°-34'E.1198.9 feet; S.76°-01'E.394.5 feet; S.86°-01'E.1701 feet; S.76°-21'E.413.7 feet; 5.85°-37'E.1175.7 feet; S.85°-37'E.549.6 feet; S.88°-22'E.447.2 feet; N.89°-06'E.484.0 feet; N.86°-10'E.1370.5 feet; N.78°-08'E.528.9 feet to the mouth of Shawnee Creek at its confluence with the Red River, the same being the Northeast corner of Tract T-2-4.

(8) The boundary line delineated hereinabove is depicted by a line marked "STATE LINE" on the plat of the survey commissioned by the States and filed herewith as Appendix C-1.

(9) The construction of the Texoma Reservoir and Denison Dam did not alter the boundary between Texas and Oklahoma as the South bank of the Red River as it existed prior to such construction in any manner whatsoever.

(10) The State of Oklahoma, its officers, agents, representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of Texas over the territory adjudged to her by this decree; and the State of Texas, its officers, agents,

representatives and citizens, are perpetually enjoined from disputing the sovereignty, jurisdiction and domain of Oklahoma over the territory adjudged to her by this decree.

(11) The cost of this action shall be equally divided between the two States.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

JAMES R. MEYERS
Assistant Attorney General

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DEPARTMENT OF THE ARMY
TULSA DISTRICT, CORPS OF ENGINEERS
POST OFFICE BOX 61
TULSA, OKLAHOMA 74121

8 October 1980

Mr. Leon Barish
Attorney General's Office
PO Box 12548
Austin, TX 78711

Dear Mr. Barish:

This letter is in response to your letter of 22 September 1980, State Abstract Nos. 328 (T-2-1 and T-2-2) and 631 (T-2-1, T-2-2 and T-2-4). Copies of these abstracts (previously furnished) are true and accurate reproductions of the originals maintained by the Corps of Engineers.

Ms. Carolyn Walker is no longer with this office. In the future, correspondence should be addressed to: DA, Tulsa District, Corps of Engineers, PO Box 61, ATTN: Office Management Branch, OAS, Tulsa, OK 74121.

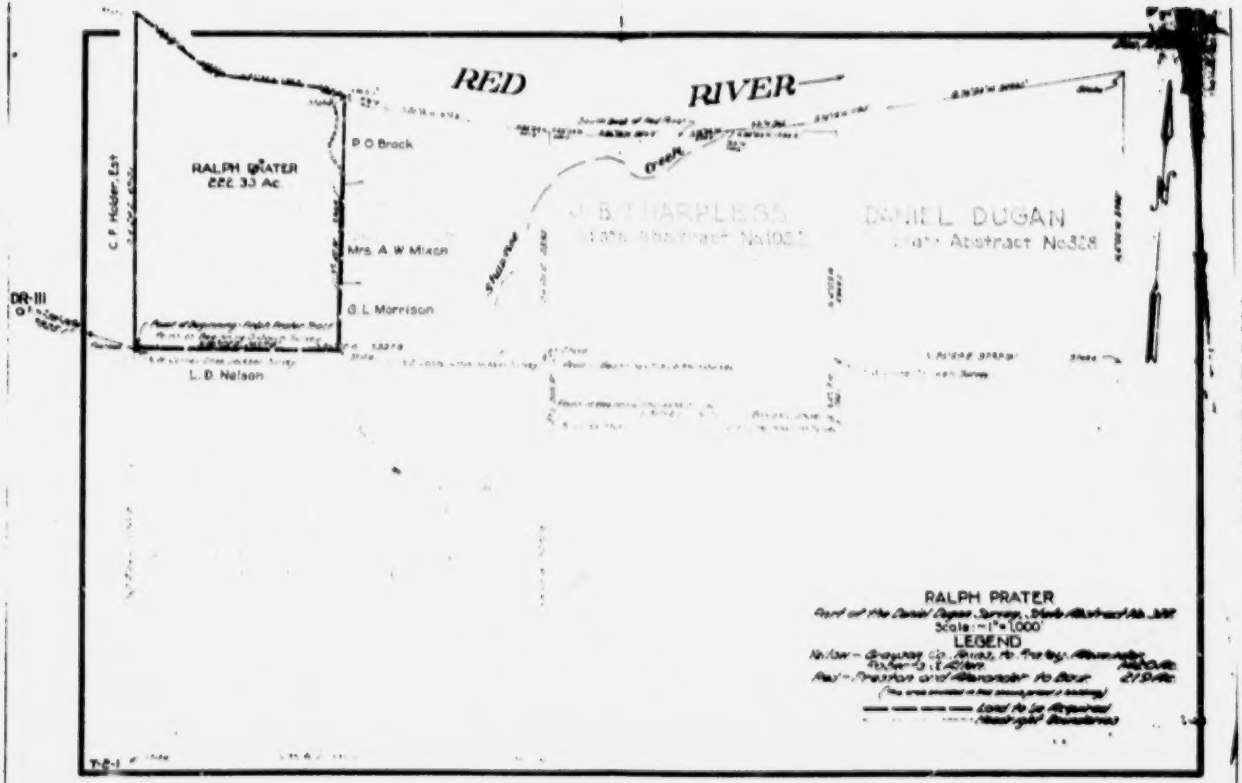
Sincerely,

/s/

VICTOR M. BOWMAN
Assistant Chief, OAS

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APPENDIX A-1


RED
RIVER
RALPH PRATER
222.33 Ac.
P.O. Brock
Mrs. A.W. Mixer
G.L. Morrison
L.D. Nelson
C.F. Hosier Est
DR-III
J.B. HARPLESS
DANIEL DUGAN
RALPH PRATER
Scale - 1" = 1,000'
LEGEND

APPENDIX B-1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	*	
	*	
VS	*	NO. 28 Civil
	*	
993 Acres of land in Grayson County, Texas, and Ralph Prater. et al.	*	

Whereas, on/the (sic) 1st day of July 1940, judgment was entered in the above entitled and numbered cause confirming and making final the award of the special commissioners as to Tract No. T-2-1, Ralph Prater et al. 222.33 acres of land, the award of the said special commissioners being filed herein on the 19th day of June 1940.

And it appearing to the court that the proceedings had herein were in all respects regular and in conformity with the law, and that the United States of America has complied with said judgment of the court, entered on the 1st day of July 1940, by depositing in the Registry of the Court the sum of $7,477.16 the amount aggregating the total amount of said award and interest as decreed in said judgment; and the United States of America having made motion herein that final judgment be entered vesting the entire and unencumbered fee simple title to the tract of land hereinafter described in the United States of America.

It is therefore, ordered, adjudged, and decreed by the court that the entire and unencumbered fee simple title to the hereinafter described tract of land be vested in the United States of America and be divested out of the defendants Ralph Prater, Alberta J. Prater, and the Magnolia Petroleum Company, and all other parties

defendants herein, said lands being described as follows:

All that certain tract or parcel of land lying and being in Grayson County, Texas situated on the waters of Red River, embracing in part the following patented survey; Daniel Dugan, Abstact No. 328, dated January 9, 1840.

All bearings in this description are turned from the true meridian and all distances are expressed in feet.

BEGINNING at the original S.W. corner of the Daniel Dugan Survey, same being a common corner to the Charles Jackson, Joseph Jewell, Jesse Myers Surveys, an old Post Oak Stump in public road (old witness trees gone) Dr. Monument No. 111 bears N. 76° 59'20" W. 7825.1 feet.

THENCE N. 86 °02' E. with the division line between the property of Ralph Prater and L.D. Nelson 2657.4 feet to a stake in public road, same being the N. E. corner of the L. D. Nelson tract, and the S. E. corner of this tract.

THENCE N.3°49'W. with the division line between the property of Ralph Prater, G. L. Morrison, Mrs. A. W. Mixson and P. O. Brack, 3266.1 feet to a stake on the south bank of Red River, same being the N. W. corner of the P. O. Brack tract, and the N. E. corner of this tract.

THENCE up the south bank of Red River, with its meanders; N. 76°01' W. 394.5 feet; N. 87°34' W. 1198.9 feet; N. 68°27' W. 362.2 feet; N. 55°54' W. 1030.8 feet to a stake, same being the N. E. corner of the C. F. Holder tract and the N. W. corner of this tract.

THENCE S. 4-°29' E with the west boundary line of the Daniel Dugan Survey common to the east boundary line of the Joseph Jewell Survey 4313.1 feet to the place of beginning, containing 222.33 acres, be the same more or less.

This the 7th day of September 1940.

A true copy I certify
Lee Simons Clerk.
(signed)Randolph Bryant By Catherine W. Gray
Deputy Seal (SEAL)

United States District
Judge.

Filed Sept. 7, 1940, Lee Simmons, Clerk U.S. Courts, by Catherine W. Gray, Deputy, Civil Order Book Vol. A, page 148

Filed for record Sept. 11, 1940 at 9'A.M.
Recorded September 16, 1940.

C. H. BARRETT, County

C. H. BARRETT, County
Clerk.

BY *Mary Emma Rheay* Deputy.

THE STATE OF TEXAS Paul E. Lee, County Clerk,
COUNTY OF GRAYSON Grayson County

Texas, do hereby certify that the within and foregoing is a true and correct copy of Certified copy of Condemnation Case No. 28 Civil as the same appears of record in Volume 417 Page 23 if the Deed Records of Grayson County, Texas.

Witness my hand and seal of office at Sherman, Texas, this the 29th day of August 1980.

Paul E. Lee, County Clerk,
Grayson, County, Texas
By *Suzanne Austin*
Deputy

APPENDIX B-2

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS:	§	No. 28 CIVIL
	§	
993 ACRES OF LAND IN GRAYSON COUNTY, TEXAS, AND RALPH PRATER, ET AL	§	

Whereas, on the 19th day of September, 1940, judgment was entered in the above entitled and numbered cause as to Tract No. T-2-4, Mrs. A. W. Mixson, et al., 108.49 acres of land in Grayson County, Texas, said judgment providing that the United States of America, petitioner herein, deposit in the Registry of this Court the sum of $3,000.00 with interest at the rate of 6% per annum on said amount from July 17, 1939 to the date said funds are deposited.

And it appearing to the Court that the United States of America has complied with said judgment of the Court entered as above set out by depositing in the registry of this Court the sum of $3,242.00, being the amount of said judgment and interest as decreed in said judgment; and the United States of America having made motion herein that final judgment be entered vesting the entire and unencumbered fee simple title to the tract of land hereinafter described in the United States of America.

It is therefore ordered, adjudged, and decreed by the Court that the entire and unencumbered fee simple title to the hereinafter described tract of land be vested in the United States of America and be divested out of the defendants Mrs. A. W. Mixson, and all other parties defendants herein. Said lands being described as follows:

Tract No. T-2-4

Grayson County, Texas.

All that certain tract or parcel of land lying and being in Grayson County, Texas, situated on the waters of Red River and Shawnee Creek embracing in part the following patented Surveys; Daniel Dugan, Abstract No. 328, dated January 9, 1840, Joshua B. Sharpless, Abstract No. 1092, dated December 30, 1939.

All bearings in this description are turned from the true Meridian and all distances are expressed in feet.

BEGINNING at a stake the N.W. corner of the G. L. Morrison tract, which is also the S. W. corner of this tract, from which the S. W. corner of the Daniel Dugan Survey bears S. 3° 49' E. 894.0 feet and S.86° 02' W. 2657.4 feet. DR Monument No. 111 bears N. 86° 09' 40" W. 10 238.3 feet.

THENCE S. 87° 59' E. with the division line between the property of Mrs. A. W. Mixson and G. L. Morrison 2055.3 feet to a stake in the bed of Shawnee Creek, same being the N. E. corner of the G. L. Morrison tract and the S. E. corner of this tract.

THENCE down the center of Shawnee Creek, with its meanders; N. 12° E. 246.1 feet; N. 42° 30' E. 248.0 feet; N. 9° E. 455.0 feet; N. 13° 45' E. 405.0 feet; N. 32° 15' E. 211.0 feet; N.41°45'E.405.0 feet; N.70°30'E.603.0 feet; S.73°30'E.166.0 feet; S.46°30'E.265.0 feet; N.87°30'E. 255.0 feet; N.57°30'E.209.0 feet; N.43°15'E.230.0 feet;N.59°15'E.469.0 feet; N.48°30'E.230.0 feet to the mount of Shawnee Creek at its confluence with Red River.

THENCE up the south bank of Red River, with its meanders; S. 78° 08' W. 528.9 feet; S. 86° 10' W. 1370.5 feet; S. 89° 06' W. 484.0 feet; N. 88° 22' W. 447.2 feet; N. 85° 37' W. 549.6 feet to a stake on the south bank of Red

River, same being the N. E. corner of the P. O. Brack tract and the most northern N. W. corner of this tract.

THENCE S. 2° 22' W. with the division line between the property of P. O. Brack and Mrs. A. W. Mixson 589.8 feet to a stake for corner, the S. E. corner of the P. O. Brack tract and an interior corner of this tract.

THENCE S. 77° 52' W. with the division line between the property of P. O. Brack and Mrs. A. W. Mixson 1630.8 feet to a stake for corner, same being the S. W. corner of the P. O. Brack tract and the most western N. W. corner of this tract.

THENCE S. 3° 49' E. with the division line between the property of Ralph Prater and Mrs. A. W. Mixson 1242.1 feet to the place of beginning, containing 108.49 acres, be the same more or less.

This the 23rd day of November, 1940.

Filed ___ M. Nov. 23, 1940. /s/ Randolph Bryant
Lee Simmons, Clerk U.S. Court
By Ruth B. Head, Deputy. United States District Judge
Eastern District of Texas

(SEAL) a true copy I certify.

By Ruth B. Head, Deputy.

Filed for record November 23rd, 1940 at 11' A.M.
Recorded November 27th 1940.

C. H. BARRETT, County Clerk.

By *Marjorie Owen*, Deputy.

THE STATE OF TEXAS
COUNTY OF GRAYSON Paul E. Lee, County Clerk, Grayson County, Texas, do hereby certify that the within and foregoing is a true and correct copy of CC of Condemnation Case as the same appears of record in Volume 420 Page 556 of the Deed Records of Grayson, County, Texas.

Witness my hand and seal of office at Sherman, Texas, this the 29th day of August 1980.

PAUL E. LEE, County Clerk, Grayson County, Texas

By: *Suzanne Austin* Deputy

APPENDIX B-3

(REVENUE $2.50)

527. Office Chief of Engineers.
6500 (Red R.-Denison, Res.) 156/3
Jan 8, 1940.

THE STATE OF TEXAS §
KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF GRAYSON §

That I, P. O. Brack, a widower, of the County of Grayson, State of Texas, for and in consideration of the sum of Two Thousand Forty & No/100 ($2040.00) Dollars to me, cash in hand paid by the United States of America, have Granted, Sold and Conveyed, and by these presents do Grant, Sell and Convey, unto the said United States of America or its assigns all that certain tract or parcel of land lying and being in Grayson County, Texas, situated on the waters of Red River, embracing in part the following patented survey: Daniel Dugan, Abstract No. 328, dated January 9, 1840; all bearings in this description are turned from the true Meridian and all distances are expressed in feet;

BEGGINING at a stake the S. W. corner of this tract, from which the S. W. corner of the Daniel Dugan Survey bears S. 3° 49' E. 2136.1 feet and S. 86° 02' W. 2657.4 feet. DR Monument No. 111 bears S. 86° 52' 10" W 10,147.5 feet;

THENCE N. 77° 52' E. with the division line between the property of P. O. Brack and Mrs. A. W. Mixson 1630.8 feet to a stake, the S. E. corner of this tract;

THENCE N. 2° 22' E. continuing with the division line between the property of P.O. Brack and Mrs. A. W. Mixson 589.9 feet to a stake on the south bank of Red River;

THENCE up the south bank of Red River, with its meanders; N.85°37'W.1125.7 feet, N.76°21'W.413.7 feet, N.86°01'W.170.1 feet to a stake, the N.E. corner of the Ralph Prater Tract, same being the N.W. corner of this tract;

THENCE S. 3° 49' with the division line between the property of P. O. Brack and Ralph Prater 1130.0 feet to the place of beginning, containing 31.73 acres, be the same more or less, including any and all interest in and to any land in the Daniel Dugan Survey in Grayson County, Texas, together with all riparian rights, including all accretion, reliction, alluvian and submerged lands.

TO HAVE AND TO HOLD the above premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said United States of America or its assigns forever and I do hereby bind myself, my heirs, executors and administrators, to Warrant and Forever Defend, all and singular the said premises unto the United States of America, or its assigns, against every person whomsoever lawfully claiming, or to claim the same or any part thereof.

Witness my hand at Denison Texas, this 28 day of December, 1939.

Witness at request of
Grantor; P. O. Brack.

Darwin Harlicht.

THE STATE OF TEXAS
COUNTY OF GRAYSON

Before me, the undersigned, a Notary Public in and for said County and State, on this day personally appeared P. O. Brack, a widower, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

(L.S.)

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 28th day of December, A.D. 1939. Jas. D. Buster, Notary Public in and for Grayson County, Texas.

Filed for record Feb. 6,
1940 at 4'P.M.
Recorded Feb. 8, 1940. C. H. Barrett, County Clerk

By *Mary Emma Rheary* Deputy.

THE STATE OF TEXAS
COUNTY OF GRAYSON Paul E. Lee, County Clerk, Grayson County, Texas, do hereby certify that the within and foregoing is a true and and correct copy of Warranty Deed as the same appears of record in Volume 417 Page 23 of the Deed Records of Grayson, County, Texas.

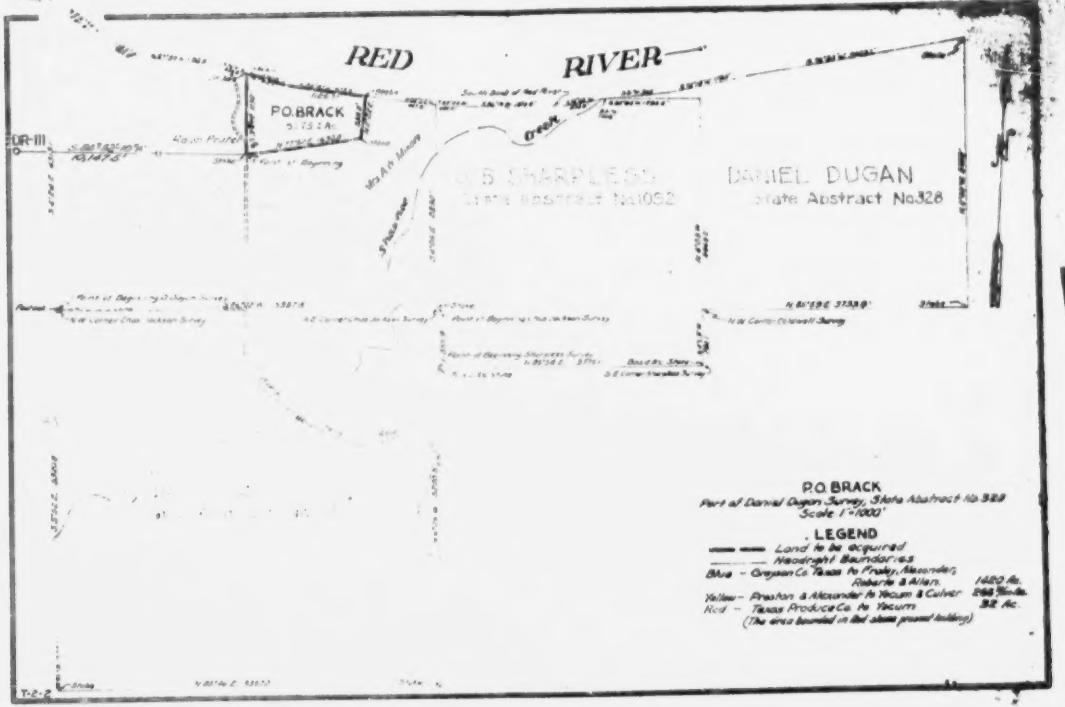
Witness my hand and seal of office at Sherman, Texas, this the 29th day of August, 1980.

PAUL E. LEE, County Clerk, Grayson, County, Texas

By /s/ Deputy
Suzanne Austin

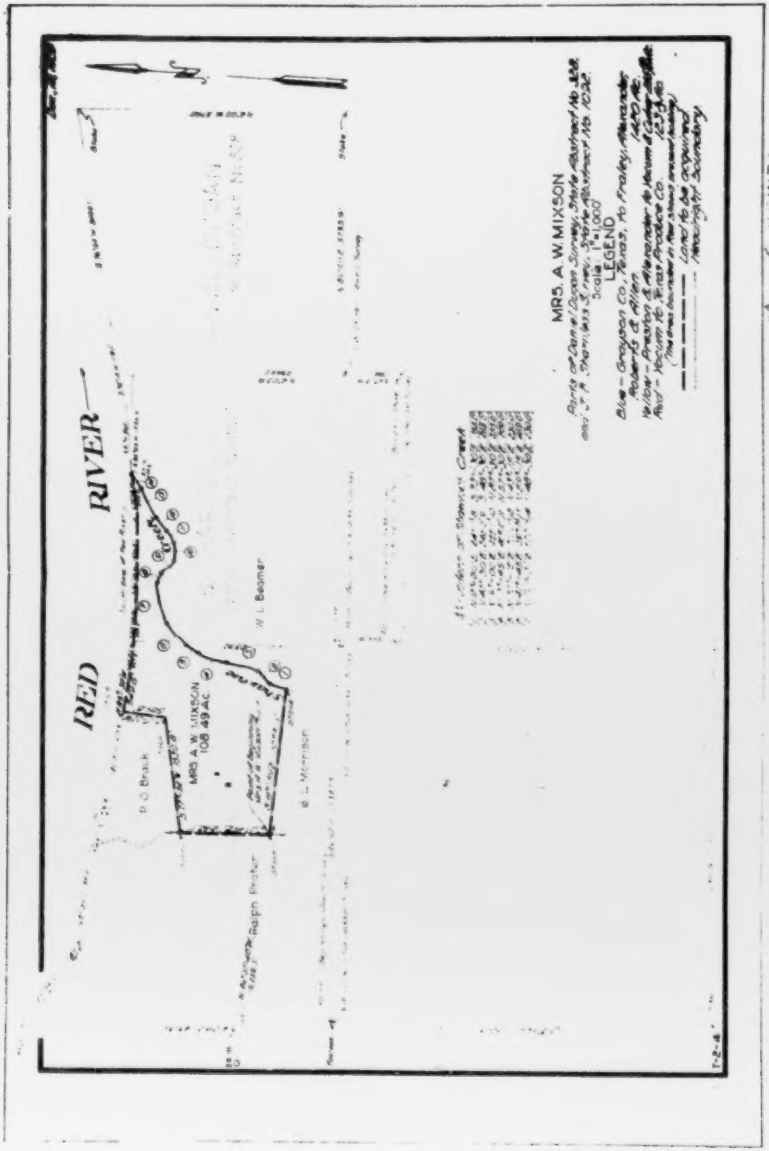
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APPENDIX A-2



"A" - 6 PRINTS

APPENDIX A-3


RED
RIVER
MRS. A. W. MIXSON
Scale 1"=1,000'
LEGEND
MRS A W MIXSON
108.49 Ac
W. L. Bonner
Ralph Parker

APPENDIX C-2

GEORGE COLLIS LAND SURVEYORS
RT. 7 BOX 123 M
McKINNEY, TEXAS 75069
542-6989
248-4288 (METRO)

November 24, 1980

The Honorable Mark White
Attorney General of Texas
P. O. Box 12548, Capitol Station
Austin, Texas 78711

The Honorable Jan Eric Cartwright
Attorney General of Oklahoma
State Capitol
Oklahoma City, Oklahoma 73105

Gentlemen:

On June 23, 1980, we were retained by your offices to make a reenactment survey on three tracts of land situated south of the Red River in the vicinity of Denison Dam in Grayson County, Texas. These tracts are known as Tract T-2-1, Tract T-2-2, and Tract T-2-4, all acquired by the United States by judgments entered during 1940 in Civil Action No. 28 in the United States District Court for the Eastern District of Texas.

We began our field survey on May 8, 1980 and continued through August 27, 1980. We found monuments along the south boundary line of lands acquired by the United States and began our reenactment survey of the three tracts. Tracts T-2-1 was found to encompass within its boundaries a portior of the Texoma Reservoir Dam (Denison Dam), its stilling basin, powerhouse,

switching station, influent structure, and spillway which we accurately located from the boundaries of Tract T-2-1.

In our survey made on the ground, when tying back to the original South Bank of the Red River, we found by the physical evidence that the northern boundaries of Tracts T-2-1, T-2-2 and T-2-4 (coinciding with the South Bank of the Red River) as established by the Corps of Engineers in its survey of 1939 were correct at the time that survey was made, which was prior to the construction of the Reservoir Dam Facility.

We also verified our survey and the descriptions of the three tracts contained in the 1940 United States acquisition judgments (which were based on the 1939 Corps of Engineers Survey) with the original field notes of the Daniel Dugan, Jr. Survey, dated January 9, 1840, the original patent of said survey from the Republic of Texas to Daniel Dugan, Jr. dated December 1, 1845, and the original field notes of the J. B. Sharpless Survey, dated December 30, 1839, and find that the South Bank of the Red River as called for in said original field notes and patent was located approximately 57.5 feet North of the South Bank as shown in our survey and in the description of the three tracts in the United States acquisition judgments.

We submit the attached plat, marked Exhibit A, showing the location of the South Bank of the Red River as it existed prior to the construction of the Texoma Reservoir Dam (Denison Dam), the actual physical location of the above mentioned structures, all being South of the original South Bank of the Red River within the State of Texas.

I, George Collis, Registered Public Surveyor No. 1764, State of Texas, do hereby certify that this survey was conducted by me upon the ground and to the best of my

knowldedge all facts presented herein are true and correct.

(seal)
State of Texas
George Collis
1764
Public Surveyor

/s/
GEORGE COLLIS

PROOF OF SERVICE

I, Justin Andrew Kever, a member of the Bar of this Court, do hereby certify that three true and correct copies of the above and foregoing Motion for Entry of Judgment by Consent of Plaintiff and Defendant have been served on each party separately represented in this proceeding by depositing the same in a United States Pose Office, with first-class postage prepaid, certified, return receipt requested, on this 28th day of May, 1981.

_____

Justin Andrew Kever

Office - Supreme Court, U.S.
FILED
MAY 28 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 85, Original

THE STATE OF TEXAS,

Plaintiff,

V.

THE STATE OF OKLAHOMA,

Defendant.

AMENDED MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

JAMES R. MEYERS
Assistant Attorney General

JUSTIN ANDREW KEVER
Assistant Attorney General

LEON J. BARISH
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Attorneys for Plaintiff
The State of Texas

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

MICHAEL L. BARDRICK
Assistant Attorney General

112 State Captiol
Oklahoma City, Oklahoma
(405) 521-3921

Attorneys for Defendant
The State of Oklahoma

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 85, Original

THE STATE OF TEXAS,

Plaintiff,

V.

THE STATE OF OKLAHOMA,

Defendant.

AMENDED MOTION FOR ENTRY OF JUDGMENT BY CONSENT OF PLAINTIFF AND DEFENDANT

COME NOW the State of Texas and the State of Oklahoma, by and through their respective Counsel of record, and move this Honorable Court to enter judgment in this action, as specified in the Motion for Entry of Judgment by Consent of Plaintiff and Defendant previously filed in this cause, as amended herein.

The boundary description contained in Paragraph (7) of such Motion does not coincide directly with the field notes appearing on the survey plat which comprises Appendix C-1 of such Motion. This discrepency is due to a directional change in the narrative description of the boundary from that which appears in Appendix C-1. Several printing errors also appear in the narrative description of the boundary in Paragraph (7) of the original Motion. To obviate these problems, Paragraph (7) is amended to read as follows:

> (7) The boundary between Texas and Oklahoma determined by this judgment coin-

cides with the boundaries of Tracts T-2-1, T-2-2 and T-2-4 and is described as follows, with all bearings from the above referenced judgment and deed descriptions, and all distances in feet:

BEGINNING at a point, same being the centerline of Shawnee Creek and the Northeast corner of Tract T-2-4 as acquired by the United States in a Judgement as recorded in Volume 420 Page 556 of the Deed Records of Grayson County, Texas.

THENCE up the south bank of the Red River as it existed prior to the construction of the Texoma Reservoir and Denison Dam, with its meanders: South 78°08' West a distance of 528.9 feet; South 86°10' West a distance of 1370.50 feet; South 89°06' West a distance of 484.0 feet; North 88°22' West a distance of 447.2 feet; North 85°37' West passing the Northeast corner of Tract T-2-2 as recorded in Volume 417 Page 23 of the Deed Records of Grayson County, Texas and the total distance of 1675.30 feet; North 76°21' West a distance of 413.7; North 86°01' West a distance of 170.10 feet to the Northwest corner of Tract T-2-2;

THENCE North 76°01' West a distance of 394.50 feet; North 87°34' West a distance of 1198.90 feet; North 68°27' West a distance of 362.20 feet; North 55°54' West a distance of 1030.80 feet to a point, same being the Northwest corner of Tract T-2-1 as acquired by the United States in a Judgment as recorded in Volume 417 Page 123 of the Deed Records of Grayson County, Texas.

As amended, the narrative description of the boundary in Paragraph (7) coincides directly with the field

notes appearing on the survey plat comprising Appendix C-1 of the original Motion.

WHEREFORE, the Plaintiff and Defendant, by and through their respective Counsel, move the Court to enter a judgment in this cause as described in the Motion for Entry of Judgment by Consent of Plaintiff and Defendant, as amended herein, each party hereby consenting thereto.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. Gray, III
Executive Assistant

JAMES R. MEYERS
Assistant Attorney General

JUSTIN ANDREW KEVER
Assistant Attorney General

LEON J. BARISH
Assistant Attorney General

P.O. Box 12548, Capitol Station
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(512)479-8191

Attorneys for Plaintiff
The State of Texas

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

MICHAEL L. BARDRICK
Assistant Attorney General

112 State Capitol
Oklahoma City, Oklahoma

(405) 521-39021

Attorneys for Defendant
The State of Oklahoma

PROOF OF SERVICE

I, Justin Andrew Kever, a member of the Bar of this Court, do hereby certify that three true and correct copies of the above and foregoing Motion for Entry of Judgment by Consent of Plaintiff and Defendant have been served on each party separately represented in this proceeding by depositing the same in a United States Post Office, with first-class postage prepaid, certified, return receipt requested, on this _____ day of _____, 1982.

_____

Justin Andrew Kever

Office - Supreme Court, U.S.
FILED
JAN 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 85, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF TEXAS, *Plaintiff,*

v.

STATE OF OKLAHOMA, *Defendant.*

REPORT OF SPECIAL MASTER ON MOTION FOR ENTRY OF JUDGMENT BY CONSENT

John A. Carver, Jr.
Special Master

600 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202

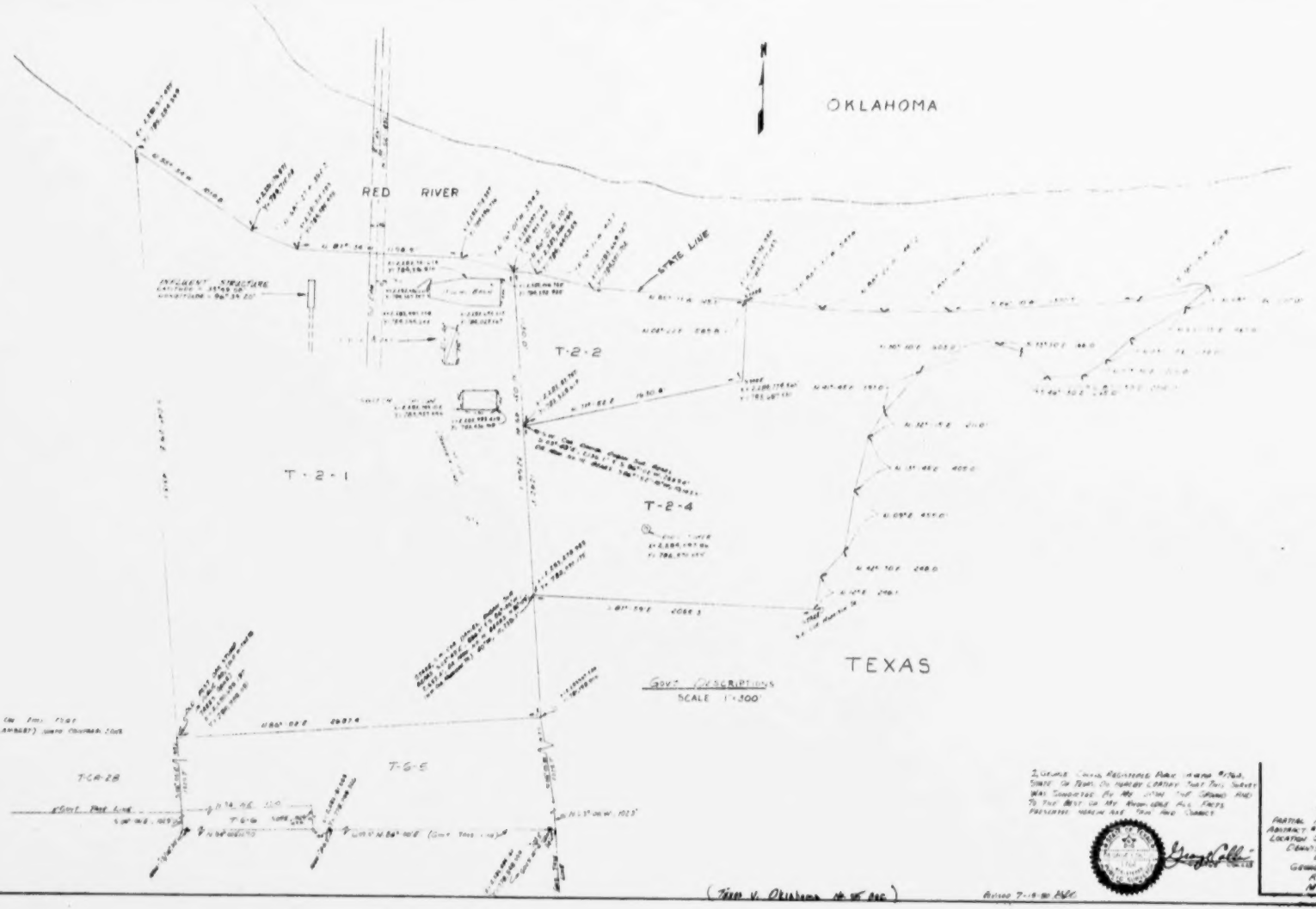


EXHIBIT-(4)

PARTIAL MAP OF LANDS, DEDICATED TO THE PUBLIC USE, IN ABSTRACT # 828, GRAYSON COUNTY, TEXAS, SHOWING LOCATION OF PUBLIC FOUNTAIN FACILITIES IN DENISON LAKE PROJECT, RED RIVER, TX.

DATED APRIL 15, 1970

GEORGE COLLA, LAND SURVEYOR

FIELD BOOK

MCKINNEY, TEXAS

In the
Supreme Court of the United States
OCTOBER TERM, 1979

No. 85, Original

STATE OF TEXAS, *Plaintiff,*

v.

STATE OF OKLAHOMA, *Defendant.*

REPORT OF SPECIAL MASTER ON MOTION FOR ENTRY OF JUDGMENT BY CONSENT

The State of Texas brought this action to establish the location of a portion of its boundary with the State of Oklahoma along the Red River. The States have agreed upon a determination of the boundary within the area of uncertainty and have filed a joint Motion for Entry of Judgment by Consent, herein referred to as the "Motion", in accordance with their determination. The Motion has been referred to the Special Master. _____ U.S. _____, (Order of June 22, 1981). The Solicitor General was advised of the Motion by the Special Master and was requested to set forth the position of the United States on the proposed consent judgment. By letter of July 28, 1981, the Deputy Solicitor General declined to intervene in this matter on behalf of the United States, but expressed agreement with the position of the States. The Special Master submits this Report recommending the granting of the Motion in all but one particular.

The Texas-Oklahoma boundary has been the subject of numerous lawsuits. The Red River originally formed the boundary between the United States and the Spanish possessions, pursuant to the Treaty of 1819, 8 Stat. 252 (1821). In *United States v. Texas,* 162 U.S. 1 (1896), the Supreme Court construed the boundary definition of the Treaty of 1819 as establishing the boundary between the Oklahoma Territory

and the State of Texas at the south cut bank of the Red River. In *Oklahoma v. Texas*, 256 U.S. 70 (1921), the Court held that the admission of Oklahoma to statehood in 1906 did not affect this boundary. The Supreme Court provided a definition of what constitutes the south cut bank of the Red River in its partial decree in *Oklahoma v. Texas*, 261 U.S. 340, 341-43 (1923), holding in pertinent part:

1. The boundary between the States of Oklahoma and Texas, where it follows the course of the Red River from the 100th meridian of west longitude to the eastern boundary of the State of Oklahoma, is part of the international boundary established by the treaty of 1819 between the United States and Spain, and is on and along the south bank of that river as the same existed in 1821, when the treaty became effective, save as hereinafter stated.

2. Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change; but where the stream has left its former channel and made for itself a new one through adjacent upland by the process known as avulsion the boundary has not followed the change, but has remained on and along what was the south bank before the change occurred.

3. Where, since 1821, the river has cut a secondary or additional channel through adjacent upland on the south side in such a way that land theretofore on that side has become an island, the boundary is along that part of the south bank as theretofore existing which by the change became the northerly bank of the island; and where by accretion or erosion there have been subsequent changes in that bank the boundary has changed with them.

4. The rules stated in the last two paragraphs will be equally applicable to such changes as may occur in the future.

5. The south bank of the river is the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed and to preserve the course of the river.

6. The boundary between the two States is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

7. At exceptional places where there is no well defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline conforming to the mean level of the waters when at other places in that vicinity they reach and wash the cut bank without overflowing it.

....

12. The two States and the United States having joined in a request that they be permitted to withdraw the prayer in their pleadings that the boundary for its full length along the river be run, located and marked upon the ground, and having also joined in a further request that the boundary be run, located and marked only at the places hereinafter named, the requests are granted. ...

....

(c) Along all places where by avulsion since 1821 the river has come to occupy a new channel. ...

Following this decree, the area of the river now in question, which forms the northern boundary of Grayson County, Texas between the 97th and 96th meridians of west longitude, was not surveyed. The commissioners who were appointed pursuant to the Court's partial decree filed a documentary report, styled as the Third Report of the Boundary Commissioners, *Oklahoma v. Texas*, 269 U.S. 536 (1925). At page 41 of the Report the following entry appears:

VII

IN
GRAYSON COUNTY, TEXAS,
OPPOSIVE
MARSHALL AND BRYAN COUNTIES,
OKLAHOMA.

Public Hearing:
Sherman, Texas, May 7, 1925

We found no avulsive changes in the position of the Red River in this County and make no surveys.

From this Report it is apparent that the area in question was not requested by the States to be surveyed, nor had there been any avulsive change in this reach which would have required a survey under the Court's decree.

The only evidence submitted which refers to surveys of the location of the south bank of the Red River is contained in Appendix C-2 to the Motion for Entry of Judgment by Consent. Appendix C-2 is the report of a surveying firm retained to survey the line proposed by the States as their boundary. The surveyors' report refers to surveys of 1839 and 1840 and indicates that the boundary shown by these early surveys is 57.5 feet north of the boundary recommended by the States.

The present controversy was generated by the construction of Denison Dam. In 1938 Congress authorized the construction of the Dam on the Red River at a point approximately five miles north of the City of Denison in Grayson County, Texas. Flood Control Act of 1938, Pub. L. No. 761, 52 Stat. 1215 (1938). The construction of the Dam resulted in the formation of Lake Texoma west of the Dam site. The Lake is approximately 25 miles long and covers the former channel of the Red River. East of the Denison Dam the River was rechan-

neled for approximately one-half mile to accommodate hydroelectric facilities. The issue in this case is whether the impoundment of water in Lake Texoma and the rechanneling of the Red River below Denison Dam have altered the south bank of the River and thereby affected the boundary between Texas and Oklahoma.

The effect of the construction of Denison Dam on the Oklahoma-Texas boundary was first raised in proceedings before the Federal Energy Regulatory Commision ("FERC"), concerning jurisdiction of the FERC over the Texas Power & Light Company. *Texas Power & Light Co.*, FERC Docket No. E-9578. The FERC is authorized under the Federal Power Act to regulate the sale of electricity in interstate commerce. 16 U.S.C. § 824 (1976). Texas Power & Light Company purchases electricity generated at Denison Dam from the Southwestern Power Administration, a part of the United States Department of Energy, which it then sells to private customers and interconnected utilities, all of whom are located within the State of Texas. Texas Power & Light Company has historically been considered a purely intrastate utility not subject to FERC jurisdiction.

One issue raised in the FERC proceedings is whether the power generating house at Denison Dam is located in the State of Texas or the State of Oklahoma. The power house was constructed south of the Red River as the River existed prior to the construction of Denison Dam. The FERC, however, has been urged to take the position that the boundary was changed by the construction of the Dam and that the new boundary is the south shore of Lake Texoma and the south bank of the rechanneled portion of the River below the dam. If this contention is correct, the power house would be located north of the state line in Oklahoma, and Texas Power & Light Company may be considered to be engaged in the interstate transmission of electricity and to be subject to FERC jurisdiction.

Texas intervened in the FERC proceedings and moved for a stay pending termination of this litigation. The stay was granted. *Texas Power & Light Co.*, FERC Docket No. E-9578 (Order of April 4, 1980).

In their Motion, the States pray that this Court adjudge the boundary between the States to be the south bank of the Red River as it existed prior to the construction of Denison Dam. This location is said by the States to coincide with the boundaries of certain tracts of land acquired by the United States in judicial actions brought to obtain land for construction of the Dam and the Reservoir.

The acquisition judgments which form the basis of the States' Motion are set forth in Appendices B-1, B-2 and B-3 to the Motion. The legal descriptions in these acquisition judgments are based upon surveys which were performed by the United States Army Corps of Engineers in 1939. The States retained a registered public surveyor of the State of Texas to prepare a reenactment survey of the surveys performed in 1939 by the Corps of Engineers. The reenactment survey and the accompanying report, Appendices C-1 and C-2 to the Motion, form the basis of the States' determination of their boundary.

Both States agree that the prior determinations of this Court with regard to the Texas-Oklahoma boundary are *res judicata*. Consequently, the proposed consent judgment must conform to the provisions of those decrees. The central issue of this case relates to paragraph 9 of the proposed consent judgment which asserts:

> The construction of the Texoma Reservoir and Denison Dam did not alter the boundary between Texas and Oklahoma as the South bank of the Red River as it existed prior to such construction in any manner whatsoever.

The conformance of this assertion to previous decisions of this Court, and in particular to the Court's partial decree of 1923, presents a question of law.

Paragraphs 2 and 3 of the Court's partial decree, quoted above, offer guidance as to what manner of changes in the River would alter the boundary between the States. Paragraph 2 provides that the location of the boundary will follow changes in the south bank caused by natural and gradual accretion or erosion, but will not follow changes in the south bank caused by avulsion. Nor, under paragraph 3, will the boundary follow changes resulting from the River cutting an "additional channel through adjacent upland on the south."

Reading the Court's partial decree as a whole, it would appear that the interpretation given the Treaty was that only natural, gradual changes in the south bank through erosion and accretion would affect the state boundary, while changes in the south bank from other causes would not affect the boundary. The alteration of the south bank of the River in connection with the construction of Denison Dam, not being the result of gradual and natural erosion or accretion, would not effect a corresponding change in the state line. Consistent with this, the States propose that the boundary be established as the last natural location of the south bank of the Red River prior to the construction of the Denison Dam. The Deputy Solicitor General agrees with this proposition.

The Special Master concludes that the construction of Denison Dam, the impoundment of water in Lake Texoma, and the rechanneling of the Red River below the Dam did not effect a change in the boundary between the States.

There remains the issue of what was the last natural location of the south bank of the Red River prior to construction of the Dam. The States propose that the line be established with reference to the northern boundaries of the three tracts

of land surveyed by the Corps of Engineers in 1939 and acquired by the United States under acquisition judgments, as previously discussed. The States propose a boundary line which is described by metes and bounds in paragraph 7 of the proposed consent judgment and which is represented to be drawn from the acquisition judgments, Appendices B-1, B-2 and B-3 to the Motion. The Special Master notes that the surveyor's report, Appendix C-2 to the Motion at 24, contains the following statement:

> We also verified our survey and the descriptions of the three tracts contained in the 1940 United States acquisition judgments (which were based on the 1939 Corps of Engineers Survey) with the original field notes of the Daniel Dugan, Jr. Survey, dated January 9, 1840, the original patent of said survey from the Republic of Texas to Daniel Dugan, Jr. dated December 1, 1845, and the original field notes of the J. B. Sharpless Survey, dated December 30, 1839, and find that the South Bank of the Red River as called for in said original field notes and patent was located approximately 57.5 feet North of the South Bank as shown in our survey and in the description of the three tracts in the United States acquisition judgments.

It is the position of the States that the shift southward of the River from 1845 to 1939 was the result of gradual erosion of the south bank. Consequently, under paragraph 2 of the Court's 1923 partial decree, quoted above, the boundary would change with the River. The Deputy Solicitor General concurs in this conclusion. There being no evidence to the contrary, the Special Master agrees with the assertion of the States that the last natural location of the south bank of the Red River prior to the construction of Denison Dam was that surveyed by the Corps of Engineers in 1939, as described in paragraph 7 of the proposed consent judgment.

Paragraph 10 of the proposed consent judgment contains language permanently enjoining each State from disputing the boundary line set forth in the proposed consent judgment. Since the proposed consent judgment, if entered by the Court, would be *res judicata*, the Special Master fails to see any necessity for a permanent injunction. Although requested to do so, neither State provided legal justification for the entry of such an injunction. By letter of August 10, 1981, both States represented that the issuance of a perpetual injunction is not essential to a resolution of this case. The Special Master recommends against it.

The Special Master recommends that the Motion for Entry of Judgment by Consent be granted and that the proposed judgment be entered, with the deletion of paragraph 10 thereof.

Dated at Denver, Colorado November 30, 1981.

John A. Carver, Jr.
Special Master

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